

WEST VIRGINIA CRIMINAL DEFENSE MOTION MANUAL



Second Edition

Prepared By

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PREFACE TO THE SECOND EDITION

In 1987, the West Virginia Public Legal Services Council, the predecessor to the West Virginia Public Defender Services, published the West Virginia Criminal Defense Motion File. Prepared by Robert McWilliams and edited by Elizabeth Murphy and Michael Frasher, the Motion File provided sample pleadings and motions designed to be incorporated in all facets of criminal defense representation.

While the majority of the motions included in the original edition remain correct in form and content, changes in case law, statutory law and rules of procedure require a revision of the Motion File. This Second Edition of the Motion File is intended to be used as a general guide to the myriad types of motions, pleadings and petitions that the general practitioner of criminal law might require in the average criminal case.

As with the first edition, the Second Edition is constructed to comport with the following authorities:

- I. West Virginia Trial Court Rules for Trial Courts of Record (T.C.R.);**
- II. West Virginia Rules of Criminal Procedure (R. Cr. P.);**
- III. West Virginia Rules of Evidence (W.V.R.E.);**
- IV. West Virginia Code (W.Va. Code);**
- V. West Virginia Rules of Appellate Procedure for the Supreme Court of Appeals (R.A.P.);**
- VI. West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings; and**
- VII. West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.**

Any suggestions for changes, alterations or corrections to this manual may be made by contacting the West Virginia Public Defender Services, Criminal Law Research Center, Building 3, Room 330, 1900 Kanawha Boulevard East, Charleston, West Virginia, 25305-0730, by calling 1-304-558-3905, or by fax at 1-304-558-1098.

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TABLE OF CONTENTS

PAGE

I. PRE-TRIAL MOTIONS

A. MOTIONS REGARDING BAIL

Comments	1
MOTION TO SET BAIL	2
MOTION FOR REDUCTION OF BAIL	3
MOTION TO REINSTATE BAIL	4
MOTION FOR POST-CONVICTION BAIL	5
MOTION TO DEVELOP BAIL RECORD	6
SUMMARY PETITION FOR BAIL	8

B. CHALLENGES TO THE INDICTMENT

Comments	10
MOTION TO CHALLENGE GRAND JURY ARRAY	11
MOTION TO CHALLENGE INDIVIDUAL GRAND JUROR[S]	12
MOTION TO DISMISS THE INDICTMENT	13
MOTION TO STRIKE SURPLUSAGE FROM INDICTMENT	14
MOTION TO DISCLOSE MATTERS OCCURRING BEFORE THE GRAND JURY	15

C. DISCOVERY AND DISCOVERY RESPONSES

Comments	16
OMNIBUS DISCOVERY MOTION	18

TABLE OF CONTENTS

PAGE

I. PRE-TRIAL MOTIONS (continued)

C. DISCOVERY AND DISCOVERY RESPONSES (continued)

DEFENDANT’S RESPONSE TO DISCOVERY REQUEST	29
MOTION FOR BILL OF PARTICULARS	30
NOTICE OF ALIBI DEFENSE	31
NOTICE OF ENTRAPMENT DEFENSE	32
MOTION TO COMPEL PRODUCTION OF DISCOVERY MATERIALS	33
DEFENDANT’S REQUEST FOR PRODUCTION OF RULE 404 (b) EVIDENCE	34
MOTION FOR <i>IN CAMERA</i> HEARING <u>REGARDING RULE 404(b) EVIDENCE</u>	35

D. SUPPRESSION, EXCLUSION AND MOTIONS IN LIMINE

Comments	36
MOTION TO SUPPRESS STATEMENT[S] OF DEFENDANT	38
MOTION TO SUPPRESS EVIDENCE	39
MOTION TO SUPPRESS PRETRIAL IDENTIFICATION EVIDENCE	40
MOTION TO SUPPRESS PHOTOGRAPHIC ARRAY	41
MOTION IN LIMINE	42
MOTION TO EXCLUDE EVIDENCE OF FLIGHT	43

TABLE OF CONTENTS

PAGE

I. PRE-TRIAL MOTIONS (continued)

E. COMPETENCY AND SANITY ISSUES

Comments	44
MOTION FOR MENTAL EXAMINATION	46
ORDER GRANTING MENTAL EXAMINATION	47
MOTION FOR HEARING ON COMPETENCY	49
MOTION FOR EXAMINATION BY INDEPENDENT EXPERT	50
MOTION FOR COMPETENCY REVIEW HEARING	51
MOTION FOR HEARING ON DEFENSE	52
NOTICE OF INSANITY DEFENSE	53
NOTICE OF EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION	54
MOTION FOR BIFURCATED TRIAL	55
MOTION FOR FURTHER MENTAL EXAMINATION	56
MOTION FOR POST-CONVICTION EXAMINATION	57

F. DISQUALIFICATION, RECUSAL AND WITHDRAWAL

Comments	58
MOTION FOR DISQUALIFICATION OF JUDGE	59
CERTIFICATE OF COUNSEL IN SUPPORT OF MOTION FOR DISQUALIFICATION	60

TABLE OF CONTENTS

	PAGE
<u>I. PRE-TRIAL MOTIONS</u> (continued)	
<u>F. DISQUALIFICATION, RECUSAL AND WITHDRAWAL</u> (continued)	
MOTION TO RECUSE THE OFFICE OF THE PROSECUTING ATTORNEY AND FOR APPOINTMENT OF SPECIAL PROSECUTOR	62
MOTION TO WITHDRAW FROM REPRESENTATION	63
CERTIFICATE OF COUNSEL IN SUPPORT OF MOTION FOR WITHDRAWAL	64
<u>G. CONSOLIDATION, SEVERANCE AND BIFURCATION</u>	
Comments	64
MOTION FOR CONSOLIDATION OF CHARGES	67
MOTION FOR SEVERANCE OF OFFENSES	68
MOTION FOR SEPARATE TRIAL [Felony]	69
MOTION FOR SEPARATE TRIAL [Misdemeanor]	70
MOTION FOR BIFURCATED TRIAL [Mercy Issue]	71
MOTION FOR BIFURCATED TRIAL [Prior Convictions]	72
<u>H. MISCELLANEOUS PRE-TRIAL MOTIONS</u>	
Comments	73
MOTION FOR SPEEDY TRIAL (ONE TERM RULE)	75

TABLE OF CONTENTS

PAGE

I. PRE-TRIAL MOTIONS (continued)

H. MISCELLANEOUS PRE-TRIAL MOTIONS (continued)

MOTION FOR DISMISSAL DUE TO FAILURE TO PROVIDE SPEEDY TRIAL [THREE TERM RULE]	76
MOTION FOR SPEEDY TRIAL [MAGISTRATE COURT]	78
MOTION FOR DISMISSAL DUE TO UNNECESSARY PRE-INDICTMENT DELAY	79
PETITION FOR HABEAS CORPUS RELIEF AND FOR DISMISSAL DUE TO FAILURE TO PROVIDE SPEEDY TRIAL [TWO TERM RULE]	80
MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS	82

II. TRIAL AND RELATED MOTIONS

A. PLEA DOCUMENTS

Comments	83
SUMMARY OF PLEA AGREEMENT	84
STATEMENT OF COUNSEL FOR DEFENDANT IN SUPPORT OF PLEA OF GUILTY	85
MOTION TO WITHDRAW PLEA	87

B. MOTIONS REGARDING THE JURY

Comments	88
MOTION TO CHALLENGE JURY SELECTION PROCEDURE	90

TABLE OF CONTENTS

PAGE

II. TRIAL AND RELATED MOTIONS (continued)

B. MOTIONS REGARDING THE JURY (continued)

STATEMENT IN SUPPORT OF MOTION TO CHALLENGE JUROR SELECTION PROCEDURES	91
MOTION FOR A CHANGE OF VENUE	92
MOTION FOR A CHANGE OF VENIRE	93
MOTION FOR SEQUESTRATION OF JURY	94
MOTION TO CONDUCT <i>VOIR DIRE</i>	95
MOTION FOR USE OF JURY QUESTIONNAIRE	96
JUROR PERSONAL HISTORY QUESTIONNAIRE	97
MOTION FOR A JURY VIEW	102
MOTION TO WAIVE JURY TRIAL	103
RESERVATION OF RIGHT AND MOTION FOR JURY TRIAL	104

C. MOTIONS REGARDING WITNESSES

Comments	105
SUBPOENA	107
SUBPOENA DUCES TECUM	108
MOTION TO SECURE ATTENDANCE OF NONRESIDENT WITNESS	109
PETITION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM	110

TABLE OF CONTENTS

PAGE

II. TRIAL AND RELATED MOTIONS (continued)

C. MOTIONS REGARDING WITNESSES (continued)

MOTION FOR DEPOSITION OF PROSPECTIVE WITNESS	111
MOTION FOR APPOINTMENT OF INTERPRETER	112
MOTION FOR DISCLOSURE OF MENTAL HEALTH RECORDS OF [<i>witness name</i>]	113

III. POST-TRIAL MOTIONS

A. CHALLENGING THE VERDICT

Comments	115
MOTION IN ARREST OF JUDGMENT	116
MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL	117
MOTION FOR A NEW TRIAL	118

B. MOTIONS REGARDING SENTENCING

Comments	119
MOTION FOR PRESENTENCE DIAGNOSIS AND CLASSIFICATION	121
MOTION FOR SENTENCING AS A YOUTHFUL OFFENDER	122
MOTION FOR PROBATION	123
PETITION FOR PROBATION [MAGISTRATE COURT]	124
MOTION FOR HOME INCARCERATION	125
MOTION FOR WORK RELEASE	126

TABLE OF CONTENTS		PAGE
III.	<u>POST-TRIAL MOTIONS</u> (continued)	
	B. <u>MOTIONS REGARDING SENTENCING</u> (continued)	
	MOTION FOR RECONSIDERATION OF SENTENCE	127
	MOTION FOR STAY OF EXECUTION OF SENTENCE	128
IV.	<u>POST-CONVICTION RELIEF</u>	
	A. APPEALS	
	Comments	129
	NOTICE OF INTENT TO APPEAL	132
	APPENDIX	
	GUIDELINES FOR PREPARATION OF APPELLATE TRANSCRIPTS IN WV COURTS	133
	APPELLATE TRANSCRIPT REQUEST	143
	INSTRUCTIONS TO COURT REPORTER	144
	MOTION TO EXTEND PERIOD FOR APPEAL	145
	MOTION TO FILE PETITION FOR APPEAL OUTSIDE TIME LIMITS	146
	SUPREME COURT OF APPEALS OF WEST VIRGINIA DOCKETING STATEMENT INSTRUCTIONS	147
	SUPREME COURT OF APPEALS OF WEST VIRGINIA DOCKETING STATEMENT	148
	MOTION TO WITHDRAW AS COUNSEL DUE TO LACK OF GROUNDS FOR APPEAL	151

TABLE OF CONTENTS

PAGE

IV. POST-CONVICTION RELIEF (continued)

BRIEF IN SUPPORT OF MOTION TO WITHDRAW AS COUNSEL DUE TO LACK OF GROUNDS FOR APPEAL	152
MOTION FOR LEAVE TO EXCEED PETITION PAGE LIMITS	154
PETITION FOR APPEAL	155
DESIGNATION OF RECORD FOR APPEAL	158
DESIGNATION OF ADDITIONAL PARTS OF RECORD FOR APPEAL	159
PETITIONER'S NOTICE OF ADEQUATE RECORD FOR APPEAL	160
ADDITIONAL DESIGNATION OF RECORD FOR APPEAL	161
BRIEF OF PETITIONER	162
B. <u>POST-CONVICTION HABEAS CORPUS PROCEEDINGS</u>	
Comments	165
RULES GOVERNING POST-CONVICTION HABEAS CORPUS PROCEEDINGS IN WEST VIRGINIA	166
Rule 1. Purpose and Scope of Rules	166
Rule 2. Petition	166
Rule 3. Filing Petition	167

TABLE OF CONTENTS

PAGE

B. POST-CONVICTION HABEAS CORPUS PROCEEDINGS (continued)

RULES GOVERNING POST-CONVICTION HABEAS CORPUS PROCEEDINGS IN WEST VIRGINIA (continued)

Rule 4. Preliminary Consideration by the Circuit Court	167
Rule 5. Answer; Contents	168
Rule 6. Appointment of Counsel	168
Rule 7. Discovery	168
Rule 8. Expansion of Record	168
Rule 9. Evidentiary hearing	169
Rule 10. West Virginia Rules of Civil Procedure; Extent of Applicability	169

APPENDIX A

PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM UNDER W.VA. CODE § 53-4A-1	170
INSTRUCTIONS	170

APPENDIX B

POST-CONVICTION HABEAS CORPUS FORM APPLICATION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT	177
CHECKLIST OF POTENTIAL GROUNDS FOR HABEAS CORPUS RELIEF	179

TABLE OF CONTENTS

	PAGE
V. <u>JUVENILE AND ABUSE/NEGLECT CASES</u>	
Comments	182
FACILITIES REVIEW PANEL V. COE	183
CHILD ABUSE AND NEGLECT PROCEEDING FLOW CHART	184
VERIFIED ANSWER TO PETITION	185
MOTION FOR PRE-ADJUDICATORY PERIOD OF IMPROVEMENT	186
MOTION FOR POST-ADJUDICATORY PERIOD OF IMPROVEMENT	188
MOTION FOR DISPOSITIONAL PERIOD OF IMPROVEMENT	189

I. PRE-TRIAL MOTIONS

A. MOTIONS REGARDING BAIL

Comments

1. Motion to Set Bail - A defendant charged with any offense punishable by less than life imprisonment is automatically entitled to bail. W.Va. Code, § 62-1C-1, as amended. Defendants are also entitled to a hearing to determine bail eligibility and the amount of such bail. R.Cr.P. 46(h).
2. Motion for Reduction of Bail - Should a defendant charged with an offense in either magistrate court or circuit court be unable to post bail, the circuit court can review the amount of such bail and may reduce such bail if circumstances warrant such reduction. W.Va. Code, § 62-1C-1(c). This situation is most commonly seen in the context of magistrate court bonds on felony charges.
3. Motion to Reinstate Bail - If a defendant's bail has previously been revoked, a defendant may move for reinstatement to bail, but should cite strong circumstances as to why such bond would not be subject to revocation in the future.
4. Motion for Post-Conviction Bail - Following conviction, a defendant may request the court to place him/her on bail pending appeal of the conviction. W.Va. Code § 62-1C-1(b). The trial court cannot place a defendant on post-conviction bail where the offense is punishable by life imprisonment or where the court determines that the offense for which the defendant was convicted was committed by the use, presentment or brandishing of a firearm, or by the use of violence to a person. A denial of bail in these circumstances is subject to review by the Supreme Court of Appeals. W.Va. Code 62-1C-1(c).
5. Motion to Develop Bail Record - In circumstances where a defendant is ineligible for bail, it is necessary that a bail record be developed so that the Supreme Court of Appeals can review the facts and circumstances and the circuit court's denial of bail. This motion requests that a hearing be set for that purpose. See State v. Steele, 173 W.Va. 248, 314 S.E.2d 412 (1984).
6. Summary Petition for Bail - The amount or denial of bail may be appealed to the Supreme Court of Appeals. W.Va. Code, § 62-1C-1. State ex rel. Ghiz v. Johnson, 155 W.Va. 186, 183 S.E.2d 703 (1971). The form included here sets forth the basic requirements for a summary petition for the denial of either pre-trial or post-conviction bail. State v. Steele, 173 W.Va. 248, 314 S.E.2d 412 (1984) and State v. Gary, 162 W.Va. 136, 247 S.E.2d 420 (1978).

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION TO SET BAIL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 46 of the West Virginia Rules of Criminal Procedure and West Virginia Code, §62-1C-1, et. seq., moved the Honorable Court to set a reasonable bail in the matter herein.

The Defendant asserts that [*he/she*] is eligible for bail in accordance with the above stated provisions, and would accordingly request a hearing on this motion.

[*defendant*],
By Counsel

[*counsel name & bar #*]

[*address*]

Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*]COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION FOR REDUCTION OF BAIL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 46 of the West Virginia Rules of Criminal Procedure and West Virginia Code, § 62-1C-1(c), as amended, to reduce the amount of bail previously established pending trial of this matter.

In support of said motion, Counsel asserts that [*state facts and argument for reduction of bond*].

The Defendant prays that the Honorable Court schedule a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION TO REINSTATE BAIL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-1C-1, et. seq., as amended, to reinstate bail in the captioned matter.

In support of said motion the defendant asserts that [*state facts and argument in support of reinstatement of bail*].

The Defendant prays that the Honorable Court schedule a hearing on this motion and, at the conclusion of said hearing, grant the relief requested in the motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION FOR POST-CONVICTION BAIL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 46(c) of the West Virginia Rules of Criminal Procedure and West Virginia Code, § 62-1C-1(b), to permit the Defendant to post bail pending sentencing and appeal of the conviction herein.

In support of said motion, the Defendant asserts that [*he/she*] is eligible for post-conviction bail in this matter for the following reasons: [*state facts and argument for post-conviction bail*].

The Defendant prays that the Honorable Court schedule a hearing on this motion and, at the conclusion of said hearing, grant the relief requested in the motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION TO DEVELOP BAIL RECORD

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 46(h) of the West Virginia Rules of Criminal Procedure, to conduct an evidentiary hearing to permit the Defendant to develop a bail record.

In support of this motion, Counsel avers that although the Defendant is not automatically entitled to bail under the circumstances of this case, the Defendant is entitled to develop a bail record to permit the West Virginia Supreme Court of Appeals to determine if post-conviction bail should be granted.

Therefore, the Defendant prays for a hearing to develop a bail record in this matter.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below,

Respondent,

vs.

Circuit Court of [*county*] County
Case # [*circuit court case #*]

[*petitioner's name*],
Defendant Below,

Petitioner.

SUMMARY PETITION FOR BAIL

Counsel For Petitioner:

[*name*]

[*address*]

SUMMARY PETITION FOR BAIL

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Jurisdiction

This is a summary petition for [pre-trial or post-conviction] bail presented to the Honorable Court in accordance with West Virginia Code, § 62-1C-1, as amended.

Factual Summary

[Insert pertinent facts, including nature of offense; place of incarceration; original date of incarceration; date of prior bail hearings and results thereof; date of and nature of conviction, if post-conviction bail is sought; and any and all other factors which might assist the Court in determining bail eligibility, including the defendant's criminal record, employment history and ties to the community. It may also be advisable to indicate potential bail amounts that your client can post. Include as exhibits certified copies of lower court's written orders regarding bond].

Points and Authorities Relied Upon

[INSERT MEMORANDUM OF LAW, INCLUDING ALL RELEVANT STATUTES AND CASE LAW PERMITTING BOND]

Prayer for Relief

[INSERT RELIEF REQUESTED]

[petitioner's name],
By Counsel

[counsel name and bar #]
[address & telephone number]
Counsel For Petitioner

CERTIFICATE OF SERVICE

I, [*Counsel Name*], Counsel for the Petitioner herein, do hereby certify that I have served this SUMMARY PETITION FOR BAIL by [*insert “ hand delivering” or “mailing, by first class United States mail, postage prepaid”*], true copies hereof, to the following designated parties, on this the _____ day of _____, 20____:

[*prosecutor’s name*]

[*prosecutor’s address*]

Counsel for Respondent, State of West Virginia

[*counsel name and bar #*]

[*address*]

Counsel for Petitioner

B. CHALLENGES TO THE INDICTMENT

Comments

1. Motion to Challenge Grand Jury Array - Under R.Cr.P. 6(b)(1), a defendant who has been “held to answer” to the circuit court (i.e., bound over to the grand jury), may file a motion to challenge the array of the grand jury. W.Va. Code § 52-1-1, et. seq., and § 52-2-1, et. seq., lists the procedure for summoning the grand jury and the qualifications for service on the grand jury.
2. Motion to Challenge Individual Grand Juror[s] - Similarly, a defendant can challenge the inclusion of any individual grand juror on the grounds that the prospective grand juror is not legally qualified. W.Va. Code, § 52-1-15, states the procedures for filing challenges to either the grand jury array or an individual grand juror. *Note that these challenges are undertaken prior to the administration of the oath to the grand jury.*
3. Motion to Dismiss the Indictment - If a defendant wishes to challenge an indictment or other defects in the institution of the criminal proceeding, the defendant must file such motions prior to trial. R.Cr.P. 12(b). The grounds for a motion to dismiss an indictment are many and varied, but can include the following:
 - a. that the indictment fails to allege essential elements of the offense charged;
 - b. that there were defects with either the grand jury or individual grand jurors;
 - c. that the defendant has been prejudiced by pre-trial delay;
 - d. that the defendant has been denied a speedy trial;
 - e. that there has been a violation of double jeopardy;
 - f. that the indictment is based upon an unconstitutional statute;
 - g. that the indictment is barred by a statute of limitations;
 - h. that there are jurisdictional defects in the proceedings; or
 - i. that there is improper joinder of two or more offenses.
4. Motion to Strike Surplusage from Indictment - A defendant can request that the court remove surplus allegations or language from an indictment. R.Cr.P. 7(d); W.Va. Code, § 62-2-9.
5. Motion to Disclose Matters Occurring Before the Grand Jury - There is a general rule that grand jury proceedings are secret, and that proceedings before the grand jury are not subject to disclosure. R.Cr.P. 6(E)(2). There are, however, exceptions to this general rule. A defendant may request disclosure of grand jury proceedings upon a particularized showing that grounds may exist for a motion for dismissal due to matters occurring before the grand jury. R.Cr.P. 6(e)(3)(C)(ii). (Note: this obviously presents a “catch-22” situation, as it is often impossible to know if grand jury misconduct occurred without disclosure. In other words, how is a defendant to know if impropriety occurred without some knowledge of the matters presented to the grand jury? In some counties, the courts are cognizant of this fact and are considerably more generous in ordering disclosure of grand jury matters.)

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO CHALLENGE GRAND JURY ARRAY

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to the provisions of West Virginia Code, § 52-2-1, et. seq., and West Virginia Code, § 52-1-1, et. seq., and Rule 6 of the West Virginia Rules of Criminal Procedure, to present [*his/her*] challenge to the array of the grand jury.

In support of said motion the Defendant avers that the grand jury, having not yet been administered their oath, was not selected, drawn or summoned in accordance with the law, and would assign as grounds the following facts: [*state specific facts and argument for challenge to grand jury array, including sworn statement or affidavit verifying such substantial failure to comply with proper procedure*].

Therefore, the Defendant requests that the Honorable Court schedule a hearing in this matter according to R.Cr.P. 6(b)(1) to determine the validity of the array.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO CHALLENGE INDIVIDUAL GRAND JUROR[S]

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to the provisions of West Virginia Code, § 52-2-1, et. seq., and West Virginia Code, § 52-1-1, et. seq., and Rule 6 of the West Virginia Rules of Criminal Procedure, to present [*his/her*] challenge to grand juror[s] (*state name of challenged grand jurors*).

In support of said motion, the Defendant avers that the named grand juror[s] were not selected, drawn or summoned in accordance with the law, and would assign as grounds the following facts: [*state specific facts and argument for challenge to grand juror[s], including sworn statement or affidavit verifying such substantial failure to comply with proper procedure*].

Therefore, the Defendant requests that the Honorable Court set a hearing in this matter according to R.Cr.P. 6(b)(1) to determine the validity of the named grand juror[s] participation.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO DISMISS THE INDICTMENT

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure, to dismiss the indictment herein.

In support of said motion, the defendant asserts the following: [*state facts and argument for dismissal of indictment*].

Wherefore, the Defendant requests that the Honorable Court dismiss the indictment returned herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO STRIKE SURPLUSAGE FROM INDICTMENT

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 7(d) of the West Virginia Rules of Criminal Procedure and West Virginia Code, § 62-2-9, as amended, to strike certain surplus language and/or allegations from the text of the indictment.

In support of said motion, Counsel avers that the following constitutes surplusage in the indictment and should be stricken: [*state surplusage sought to be stricken and grounds asserted therefore*].

Therefore, the Defendant requests that the Honorable Court strike from the indictment the language and /or allegations as noted herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO DISCLOSE MATTERS
OCCURRING BEFORE THE GRAND JURY

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 6(e)(3)(C)(ii) of the West Virginia Rules of Criminal Procedure, to order disclosure of matters occurring before the grand jury.

In support of said motion, Counsel asserts that the following matters which occurred before the grand jury may constitute grounds for dismissal of the indictment herein: [*state specific grounds for disclosure of grand jury matters*].

Therefore, the Defendant requests that the Honorable Court order disclosure of the requested matters occurring before the grand jury.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

C. DISCOVERY AND DISCOVERY RESPONSES

Comments

1. Omnibus Discovery Motion - R.Cr.P. 16 and T.C.R Rule 32 govern the nature and extent of discovery information and procedures in circuit courts. A defendant's initial request for discovery triggers the application of many of the discovery procedures. The Trial Court Rules mandate a discovery conference at the request of the defendant, at which time the parties are expected to confer and provide discovery to the opposing party. T.C.R. 32.03. There is an additional obligation on the state to make certain mandatory disclosure, regardless of whether the defendant has made a specific request for such materials. T.C.R. 32.02. There is a continuing obligation on each of the parties to provide additional discovery as such information becomes available. R.Cr.P. 16(c) and T.C.R. 32.05.
2. Defendant's Response to Discovery Request - Following a request by the defendant for discovery, the state may request discovery from the defendant. The extent of discoverable material that the defendant must provide upon such a request is governed by R.Cr.P. 6(b) and T.C.R. 32.03(b). Generally, the defendant is obligated to permit the state to inspect and/or copy photographs, documents, tangible objects, and reports of examinations and tests; to disclose names and addresses of witnesses; to disclose all information regarding potential expert witnesses; and to provide notice of alibi or insanity defenses. T.C.R. 32.03(b).
3. Motion for Bill of Particulars - Occasionally an indictment will omit specific details that are relevant in preparing the defense. A motion for a bill of particulars seeks disclosure of these details, and must be made prior to trial. R.Cr.P. 7 (f) and W.Va. Code § 62-1B-1.
4. Notice of Alibi Defense - A defendant intending to rely upon an alibi defense must, upon request, disclose details of such defense within ten [10] days of such request. Following such notice, the state is then obligated to provide the defendant with a written notice of the names and addresses of such witnesses who may rebut or contradict the defendant's alibi defense. Like the general discovery rule, the parties operate under a continuing duty to disclose additional alibi information that becomes available at a later date. R.Cr.P. 12.1, T.C.R. 32.03(b)(3).
5. Notice of Entrapment Defense - Similarly, if a defendant intends to use an entrapment defense, T.C.R. 32.02(b) indicates that the defendant should provide notice of such defense to the state. This disclosure then triggers an obligation on the state to disclose a synopsis of W.V.R.E. 404(b) information which is relevant to such defense and which the state intends to use at trial.
6. Motion to Compel Production of Discovery Materials - If the State has refused to provide certain items during the discovery procedure, or has simply not provided other required items in a timely fashion, a motion to compel production may be required. A hearing on this motion is particularly helpful when disputes arise

between the parties as to whether certain information falls within the requirements for production of discovery.

7. Defendant's Request for Production of 404(b) Evidence - It is not uncommon that some of the most damaging evidence at a trial can arrive in the form of Rule 404(b) evidence. The Court has noted that the "erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions." State v. McGinnis, 193 W.Va. 147, 153, 455 S.E.2d 516, 522 (1994). It is therefore crucial that 404(b) issues be addressed promptly and fully.

The prosecution is required under McGinnis to identify the *specific and precise purpose* for which the evidence in question is offered; it is not acceptable for the prosecution [or the court] to merely cite the possible uses of such evidence, i.e., proof of motive, intent, plan, etc. The court must conduct an *in camera* hearing to determine the admissibility of such evidence. If the court determines that the evidence is admissible, the court must provide the jury with a limiting instruction at the time the evidence is offered, and again at the time of the court's general charge.

8. Motion for *In Camera* Hearing Regarding Rule 404(b) Evidence - See # 7 above.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

Defendant.

OMNIBUS DISCOVERY MOTION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moves this Honorable Court, pursuant to Rule 32 of the Trial Court Rules and other pertinent provisions, for an Order directing the State of West Virginia to comply with the following discovery requests:

1. Written or Recorded Statements Made By Defendant:

The defendant requests that the State provide to defense counsel, prior to trial, copies of any relevant written or recorded statements made by the defendant, within the possession, custody or control of the State, the existence of which is known, or by some exercise of due diligence may become known, to the attorney for the State. R.Cr.P., Rule 16(a)(1)(A); W.Va. Code § 62-1B-2. This request includes any relevant written or recorded statement made by the defendant to any person, and is not limited to statements made to law enforcement officers. State v. Lambert, 175 W.Va. 141, 331 S.E.2d 873 (1985); State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987). This request should include any notes or preliminary statements taken by law enforcement officials while questioning the defendant.

2. Oral Statements Made By Defendant:

The defendant requests that the State provide to defense counsel, prior to trial and in writing, the substance of any oral statement which the State intends to offer in evidence at the trial made by the defendant whether before or after arrest, including notes of preliminary statements. W.Va. Code § 62-1B-2. R.Cr.P., Rule 16(a)(1)(A). This request includes any oral statement made by the defendant to any person, and is not limited to statements made to law enforcement officers. State v. Lambert, 175 W.Va. 141, 331 S.E.2d 873 (1985); State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987).

3. Defendant's Grand Jury Testimony:

The defendant requests that the State provide to defense counsel, prior to trial, true and complete copies of all recorded testimony of the defendant before a grand jury which relates to the offense charged. R.Cr.P., Rule 16 (a)(1)(A).

4. Defendant's Criminal Record:

The defendant requests that the State furnish to defense counsel, prior to trial, such copy of his/her prior criminal record, if any, as is within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the State. R.Cr.P., Rule 16 (a)(1)(B).

5. Documents and Tangible Objects:

The defendant requests that the State provide to defense counsel, prior to trial, a written list of all books, papers, documents, photographs, tangible objects, maps or drawings of buildings or places, or copies or portions thereof, which are within the possession, custody and control of the State, and which are material to the preparation of his/her defense or are intended for use by the State as evidence in chief at the trial, or were obtained from or belonged to the defendant. The defendant further requests permission to inspect and copy or photograph the same. Also, the defendant asks

that the State provide defense counsel with copies of any and/or all photographs. W.Va. Code § 62-1B-2; R.Cr.P., Rule 16 (a)(1)(c).

6. Reports of Examinations and Tests:

The Defendant requests that the State furnish to defense counsel, prior to trial, copies of all results or reports of physical or mental examinations, and of scientific tests or experiments, which are within the possession, custody or control of the State, the existence of which is known or by the exercise of due diligence may become known, to the attorney for the State, and which are material to the preparation of the defense or are intended for use by the State as evidence in chief at the trial. R.Cr.P., Rule 16(a)(1)(d); W.Va. Code § 62-1B-2.

7. Specific Information Relating to Hearsay:

The defendant requests that the State furnish to defense counsel, prior to trial, the substance of all hearsay evidence the State intends to introduce pursuant to West Virginia Rules of Evidence, Rules 803 (24) and 804 (b) (5). State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992).

8. State Witness list:

The defendant requests that the State furnish to defense counsel, prior to trial, a written list of the names and addresses of all witnesses whom the State intends to call in its case in chief. R.Cr.P., Rule 16 (a)(1)(f).

9. Rebuttal Witness List:

The defendant requests that the State furnish to defense counsel, prior to trial, a written list of the names and addresses of all rebuttal witnesses whom the State reasonably anticipates will be used during trial. State v. Roy, 194 W.Va. 276, 460 S.E.2d 277 (1995).

10. Criminal Convictions of State Witnesses:

The defendant requests that the State furnish to defense counsel, prior to trial and in writing, any record of prior convictions of all witnesses whom the attorney for the State intends to

call in the presentation of the case in chief which is within the knowledge of the State, or by the exercise of due diligence may become known to the State. R.Cr.P., Rule 16 (a)(1)(E).

11. Expert Witnesses:

The defendant requests that the State disclose to defense counsel, a written summary of testimony the State intends to use under Rules 702, 703, or 705 of the Rules of Evidence during its case in chief at trial. The summary must describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications. R.Cr.P., Rule 16 (a)(1)(E).

12. Identity of Witnesses Before the Grand Jury:

The defendant requests that the State provide to defense counsel, prior to trial and in writing, the names of all persons who testified before the grand jury regarding this case. W.Va. Code § 52-2-8.

13. Statements of Co-Defendant[s]:

The defendant requests that the State provide to defense counsel, prior to trial, copies of any written or recorded statement made by each and every co-defendant, and as well, in writing, the substance of any oral statement made by a co-defendant, which the State intends to introduce at trial. State v. McCormick, 166 W.Va. 800, 277 S.E.2d 629 (1981) [the admissibility of statements of a co-conspirator should be settled out of the jury's presence].

14. Notice of State's Intention To Use Discoverable Evidence:

The defendant requests, pursuant to R.Cr.P. Rule 12(d)(2), that the State notify defense counsel, in writing, of its intention to use, in evidence in chief at trial, any evidence which the defendant may be entitled to discover and/or move to suppress, respectively, pursuant to R.Cr.P., Rules 16 and 41. This request includes, but is certainly not limited to the following:

- (a) Any evidence or information seized or otherwise obtained during a search, or seized or otherwise obtained as a result of a search, executed by government officials or state agents, including the fruit of such search[es]; and

- (b) Any pre-trial identification procedure including, but not limited to, line-ups, photo spreads, one-on-one show-ups, and displays of one or more photographs to one or more witnesses or potential witnesses.

15. State's Intent To Use Collateral Crimes/Other Wrongs Evidence:

The defendant requests that the State provide defense counsel, prior to trial and in writing, notice of its intention to use at trial collateral crime evidence and evidence of other crimes, wrongs or acts, and, as well, a statement of State's theory of admissibility with respect to each item of such Rule 404(b) evidence. W.V.R.E., Rule 404(b); State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994); State v. Larock, 196 W.Va. 294, 470 S.E.2d 613 (1996).

16. Notice of State's Intention to Use Flight Evidence:

The defendant requests that the State furnish written notice of its intention to use evidence of flight at trial, and as well, the particulars as to the time, date, place and persons relevant thereto. Accord v. Hedrick, 176 W.Va. 154, 342 S.E.2d 120 (1986).

17. Pre-Trial Production of Statements of State Witness:

The defendant requests, pursuant to R.Cr.P., Rule 26.2 and W.Va. Const. Art. III, §14, that the State produce, in advance of trial, any statement, as defined by R.Cr.P., Rule 26.2(f), made by a witness who will be called to testify in the State's case-in-chief in the trial of this action. State v. Gale, 177 W.Va. 337, 352 S.E.2d 87 (1986); State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990). This request includes, but is certainly not limited to:

- (a) Statement[s], however taken or recorded or a transcription thereof, made by the witness to a grand jury. R.Cr.P., Rule 26.2(f)(3); State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984);
- (b) Written statement[s] made by a witness that is signed or otherwise adopted or approved by him/her. R.Cr.P., Rule 26.2(f)(1);
- (c) A substantially verbatim recital of an oral statement made by the witnesses that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical or other recording or a transcription thereof.

R.Cr.P., Rule 26.2(f)(2); and

(d) Reports of police officer. State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

18. Pre-Trial Production of Grand Jury Transcripts

The defendant requests, pursuant to R.Cr.P., Rule 6, and W.Va. Const. Art. III, § 14, that the State provide to defense counsel, prior to trial, transcripts of the proceedings before the grand jury which returned the indictment in this case, and as well, any other minutes and notes required to be kept, including the number of grand jurors concurring in the finding of the indictment in this case. In support hereof, defense counsel states:

- (a) That the disclosure to defense counsel of matters occurring before the grand jury may show that grounds exist for a motion to dismiss;
- (b) That the record required to be kept by R.Cr.P., Rule 6(c), may reveal the failure of a requisite number of grand jurors to have concurred;
- (c) That disclosure to the defense counsel of matters occurring before the grand jury will reveal evidence which tends to exculpate the defendant by indicating his/her innocence and impeaching the credibility of potential State witnesses, which disclosure is compelled under Brady v. Maryland, 373 U.S. 82 (1963), and its progeny.

19. Electronic Surveillance:

The defendant requests that the State provide to defense counsel written notice of any mail cover, wire cover, electronic surveillance, and/or surveillance by any mechanical or physical means used in connection with this case. The defendant further requests that the State provide to defense counsel a copy of the Court order authorizing such surveillance, as well as copies of all other materials provided to the Court issuing said order, in support of the application for said surveillance. W.Va. Code § 62-1D-11(ik).

20. Exculpatory and Impeachment Material:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State provide to defense counsel, in writing and prior to trial,

all exculpatory materials favorable to the accused and which may negate or tend to negate guilt for the offense alleged or which may mitigate punishment, and all evidence which could reasonably weaken or impeach any evidence proposed by the State to be introduced against the defendant. W.Va. Const. Art. 3, § 10 and § 14, U.S. Const. Amendments 5, 6 and 14.

21. Witness's Failure to Inculcate the Defendant:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, (1) any statement made by an informed witness which failed to mention the defendant, Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978); and (2) any failure by an eyewitness to identify the defendant as actor in a transaction in which the State contends he personally participated.

22. Offers of Leniency to State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the terms of any plea bargain, offer of leniency or immunity, or other inducement or agreement, whether oral or written, offered or actually given to any witness whom the State intends to call at trial. State v. Jones, 161 W.Va. 55, 239 S.E.2d 763 (1977).

23. Juvenile & Criminal Records of State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the prior juvenile and criminal records or other prior material acts of misconduct of any witness whom the State intends to call at trial. United States v. Striffler, 851 F.2d 1197 (9th Cir., 1988); United States v. Perdomo, 929 F.2d 967 (3rd Cir., 1991). This includes all declarants whose out-of-court statements the State will seek to introduce as an exception to the hearsay rule. W.V.R.E., Rule 806.

24. Probation Reports of State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, a copy of any federal or state probation or presentence report of any prospective State witness. United States v. Figurski, 545 F.2d 389 (4th Cir., 1976); United States v. Anderson, 724 F.2d 596 (7th Cir., 1984) [*presentence report contents that impeach witness' credibility are discoverable; interpreting Figurski*]; United States v. Strifler, 851 F.2d 1197 (9th Cir., 1988).

25. Complaining Witness' Efforts to Dismiss Charge:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, all oral or written requests by a complaining witness or victim to withdraw a complaint or to otherwise cause the dismissal of the charges alleged herein.

26. Polygraph Tests:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the oral/written results of any polygraph test administered to any prospective State witness. Carter v. Rafferty, 826 F.2d 1299 (3rd Cir., 1987).

27. Investigations of State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that any prospective government witness is or has been under investigation by federal, state or local authorities for any criminal conduct unrelated to the instant case. United States v. Chitty, 760 F.2d 425 (2nd Cir., 1985), cert. denied, 474 U.S. 945 (1985).

28. Prior False Statements of State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that any prospective State witness has ever made any false statement to authorities, whether or not under oath or penalty of perjury. United States v. Strifler, 851 F.2d at 1202 (9th Cir., 1988).

29. Bias/Motive of State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that any prospective State witness is biased, prejudiced or has a motive to be biased or prejudiced against the defendant for any reason. United States v. Strifler, 851 F.2d at 1202 (9th Cir., 1988); United States v. Sperling, 726 F.2d 69 (2nd Cir., 1984).

30. Inconsistent Statement[s] of State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that any prospective State witness has made a contradictory or inconsistent statement with regard to this case, and evidence that the testimony of any prospective State witness is inconsistent with any statement of any other person or prospective witness. Hudson v. Blackburn, 601 F.2d 785 (5th Cir., 1979); United States v. Hibler, 463 F.2d 455 (9th Cir., 1972); Mesarosh v. United States, 353 U.S. 1 (1956); Johnson v. Brewer, 521 F.2d 556 (8th Cir., 1975).

31. Medical/Psychiatric Condition of State Witnesses:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective State witness' ability to perceive, remember, communicate or tell the truth is impaired;

and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir., 1980);United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461 (4th Cir., 1980).

32. Informant's CI File:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, if the prosecution intends to call an informant in this case, provide a copy of the informant's personnel ["CI"] file. United States v. Garrett, 542 F.2d 23 (6th Cir., 1973); United States v. Austin, 492 F.Supp.502 (N.D. Ill. 1980).

33. Evidence of Other Suspects in This Case:

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that someone other than the defendant committed, or was ever suspected of committing, the crimes charged or of performing the role in the offense which the State intends to prove was performed by the defendant. Miller v. Angliker, 848 F.2d 1312 (2nd Cir., 1988);Bowen v. Maryland, 799 F.2d 593 (10th Cir., 1986);James v. Jago, 575 F.2d 1164 (6th Cir., 1978).

34. Witnesses Not Called By The State

Pursuant to Brady v. Maryland, 373 U.S. 82 (1963), and Kyles v. Whitley, 514 U.S. 419 (1995), the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the names and addresses of witnesses to the offenses allegedly committed by the defendant whom the State does not intend to call at trial. United States v. Cadet, 727 F.2d 1453 (9th Cir., 1984); State v. Bennett, 176 W.Va. 1, 339 S.E.2d (1985); State v. Mansfield, 175 W.Va. 397, 332 S.E.2d 862 (1985).

35. Additional Discovery Requests:

The defendant requests permission to file such additional discovery requests as defense counsel deems necessary as a result of defense counsel's further investigation of this case and the production of the State's discovery responses.

Therefore, the defendant respectfully prays this Honorable Court for the relief requested in the premises herein, as well as any other relief which this Honorable Court deems proper.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[address]
Counsel for Defendant

IN THE CIRCUIT COURT OF [county] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [case number]
[judge's name], JUDGE

[client's name],
DEFENDANT.

DEFENDANT'S RESPONSE TO DISCOVERY REQUEST

On this date came the Defendant, [name], by [his/her] Counsel, [counsel's name], and pursuant to Rule 16(b) of the West Virginia Rules of Criminal Procedure and Rule 32.03 of the Trial Court Rules, does hereby respond to the motion for discovery filed by the state as follows:

A. Documents and Tangible Objects - *[list all documents and tangible objects that are intended to be used in the defendant's case-in-chief];*

B. Reports of Examinations and Tests - *[list and/or attach reports that the defendant intends to use in the case-in-chief];*

C. Expert Witnesses - *[if the defendant has requested expert information from the state, the defendant must provide a similar summary of the expert witnesses that the defendant might use in the case-in-chief];* and

D. Defense Witnesses - *[if the defendant requested a list of witnesses from the state, the defendant must provide a list of the names and addresses of proposed defense witnesses].*

[defendant],
By Counsel

[counsel name and bar #]
[address]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR BILL OF PARTICULARS

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 7(b) of the West Virginia Rules of Criminal Procedure and West Virginia Code, § 62-1B-1, as amended, to require the state to furnish the Defendant with the following details omitted from the indictment: [*state specific details sought*].

Therefore, the Defendant requests that the Honorable Court order the state to disclose the matter sought herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

NOTICE OF ALIBI DEFENSE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 12.1 of the West Virginia Rules of Criminal Procedure and Rule 32.03(b)(3) of the Trial Court Rules does hereby provide notice of the Defendant's intention to offer a defense of alibi in the present case.

The Defendant provides the following details of the alibi defense:

1. [*list specific place[s] and address[es] of defendant's alibi*];
2. [*list name[s] and address[es] of alibi witnesses*].

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

NOTICE OF ENTRAPMENT DEFENSE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 32.02(b) of the Trial Court Rules does hereby provide notice of the Defendant's intention to offer a defense of entrapment in the present case.

Therefore, the Defendant, pursuant to the above stated provision, demands that the State provide to the Defendant a synopsis of any and all evidence of other crimes, wrongs or acts about which the State has information and which is relevant to said defense and intended for use by the State in its case-in-chief or in rebuttal.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO COMPEL PRODUCTION OF DISCOVERY MATERIALS

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure and Rule 32 of the Trial Court Rules, to compel the State of West Virginia to provide discovery of the following materials:[*list materials sought, together with applicable rule, statute or case permitting discovery*]. The Defendant asserts that production of the requested materials is required under the applicable discovery provisions.

Therefore, the Defendant requests that the court schedule a hearing on the motion herein and, upon conclusion of said hearing, grant the relief requested in the motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**DEFENDANT'S REQUEST FOR PRODUCTION OF
RULE 404 (b) EVIDENCE**

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 404(b) of the West Virginia Rules of Evidence and Rule 32.02(b) of the Trial Court Rules, does hereby demand that the State of West Virginia provide the defendant with any and all information regarding potential Rule 404(b) evidence that may exist in the present case.

Counsel for the Defendant would further demand, pursuant to State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994), that the State identify the specific and precise purpose for which each and every item of proposed 404(b) evidence being offered.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**MOTION FOR *IN CAMERA* HEARING
REGARDING RULE 404(b) EVIDENCE**

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 404(b) of the West Virginia Rules of Evidence and State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994), requests that the Court conduct an *in camera* hearing to determine the admissibility of potential Rule 404(b) evidence.

In support of this Motion, Counsel for the defendant asserts that the State of West Virginia intends to present the following evidence at trial, to-wit: [*state specific nature of 404(b) evidence*]. The Defendant asserts that this evidence is the specific type of character evidence prohibited by Rule 404(b). Accordingly, under the mandatory provisions of State v. McGinnis, *supra*, and Rule 104(a) of the West Virginia Rules of Evidence, the court must conduct an *in camera* hearing to determine whether such evidence is admissible.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

D. SUPPRESSION, EXCLUSION AND MOTIONS IN LIMINE

Comments

1. Motion to Suppress Statement[s] of Defendant - Typically, the most damaging evidence against a client are a client's own words. It is therefore crucial to make every attempt to eliminate the use of these statements. It is common for the state to view a "statement" as a formal written document, so it is therefore necessary to attempt to suppress both written and oral statements. Under R.Cr.P.12(b)(3), it is necessary to raise this issue prior to trial, unless such statements are not known to the defendant.
2. Motion to Suppress Evidence - In a similar vein, it is often vitally important for the attorney to zealously attempt to suppress the results of certain items of evidence that the state intends to use against the defendant. This motion is most often used to suppress the results of an illegal search or seizure of the defendant's property. It is also necessary to file this motion prior to trial, unless the existence of such evidence is not known to the defendant.
3. Motion to Suppress Pretrial Identification Evidence - Many criminal cases are decided upon the basis of "eyewitness" identification of the defendant as the perpetrator of the offense. It is therefore incumbent on the attorney to discover whether the "eyewitness" was subjected to suggestive and/or coercive procedures in order to arrive at his or her identification of the defendant. If there is a question as to the procedures used for identification, it is necessary for the attorney to challenge the identification procedure at an in-camera hearing.
4. Motion to Suppress Photographic Array - One of the most common investigative procedures used by police officers is the photo array. It is important that these arrays be carefully scrutinized to determine whether the array is unduly suggestive of the defendant as the perpetrator [i.e., the perpetrator is described as having a mustache, and your client is the only individual in the array with a mustache]. Most arrays are not so obviously suggestive, but it is nonetheless important that such arrays be challenged.
5. Motion in Limine - A motion in limine is used as a pretrial tool to permit the court to make determinations of the admissibility of evidence out of the presence of the jury. The uses of such a motion can be varied, but they are typically used to challenge the admissibility of evidence such as:
 - hearsay evidence;
 - irrelevant testimony or evidence;
 - character evidence of the defendant or a witness;
 - gruesome photographs;
 - generally, any other evidence of which there is a question of admissibility.

6. Motion to Exclude Evidence of Flight - In West Virginia, a defendant is entitled to an in-camera hearing before the state can use evidence of any flight by the defendant. The state will typically use such evidence as an attempt to demonstrate guilty conscience or knowledge on the part of the defendant. The court must determine whether the probative value of such evidence outweighs its prejudicial effect.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO SUPPRESS STATEMENT[S] OF DEFENDANT

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 12(b)(3) of the West Virginia Rules of Criminal Procedure and Rule 32.03(a)(1) and (2) of the Trial Court Rules, to suppress any and all statements made by the Defendant, whether written or oral, on the grounds that such statements were obtained and /or otherwise taken in violation of the Defendant's constitutional rights.

In support of said Motion, Counsel asserts the following: [*state specific facts and argument for suppression of statements*].

The Defendant therefore requests that the Court schedule a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO SUPPRESS EVIDENCE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 12(b)(3) of the West Virginia Rules of Criminal Procedure and Rule 32(a) of the Trial Court Rules, to suppress the following evidence on the grounds that such evidence was illegally seized from the care, custody and control of the Defendant: [*list specific items sought to be excluded and enumerate legal and factual grounds for each item*].

The Defendant therefore requests that the Court schedule a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO SUPPRESS PRETRIAL IDENTIFICATION EVIDENCE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to State v. Casdorph, 159 W.Va. 909, 230 S.E.2d 476 (1976) and Neil v. Biggers, 409 U.S. 188 (1972), to suppress any evidence of pretrial and trial identification of the Defendant as the perpetrator of the offense charged in the indictment herein.

In support of said Motion, the Defendant asserts that the following pretrial identification procedures undertaken in the present case were unduly suggestive and conducive to an irreparably mistaken identification: [*list specific pretrial identification procedures and facts/arguments supporting their suppression*].

Therefore, the Defendant requests that the Court schedule a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO SUPPRESS PHOTOGRAPHIC ARRAY

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to State v. Casdorph, 159 W.Va. 909, 230 S.E.2d 476 (1976) and Neil v. Biggers, 409 U.S. 188 (1972), to suppress any evidence derived from the use of a “photo array”, and in particular any evidence derived therefrom tending to inculcate the Defendant as the perpetrator of the offense charged in the indictment herein.

In support of said Motion, the Defendant asserts the following: [*list specific reasons sought for suppression of photo array*].

Therefore, the Defendant requests that the Court schedule a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION IN LIMINE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 103(c) of the West Virginia Rules of Evidence, to prohibit the state, either through its representatives or its witnesses, from disclosing the following inadmissible evidence in the presence of the jury: [*list specific evidence or testimony sought to be held inadmissible*].

In support of said Motion, the Defendant asserts the following: [*list specific reasons as to why the evidence or testimony is inadmissible*].

Therefore, the Defendant requests that the Court schedule a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO EXCLUDE EVIDENCE OF FLIGHT

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to State v. Payne, 167 W.Va. 252, 280 S.E.2d 72 (1981), to exclude certain evidence of alleged flight by the Defendant herein and for an in-camera hearing to determine the admissibility of such evidence.

In support of said Motion, Counsel asserts the following: [*state facts and legal argument supporting exclusion of flight evidence*].

Therefore, the Defendant requests that the Court schedule a hearing on this Motion and, at the conclusion of said hearing, grant the relief requested in the Motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

E. COMPETENCY AND SANITY ISSUES

Comments

1. Motion for Mental Examination - The two primary issues of concern to the criminal practitioner regarding a client's mental state are (1) the defendant's sanity [or mental responsibility] at the time of the alleged offense, and (2) the defendant's competency at the time of trial. The test in West Virginia for insanity is whether at the time of the commission of the act, the act was the result of a mental disease or mental defect to the extent that the defendant lacked substantial capacity either to appreciate the wrongfulness of the conduct, or to conform his/her conduct to the requirements of the law. State v. Lockhart, 200 W.Va. 479, 490 S.E.2d 298 (1997). Further, a defendant cannot be tried or sentenced unless the defendant possesses a sufficient present ability to consult with counsel with a reasonable degree of rational understanding and a rational, as well as factual, understanding of the court proceedings. State v. Cheshire, 173 W.Va 123, 313 S.E.2d 61 (1984). West Virginia Code, § 27-6A-1, et. seq., provides the mechanism by which a client may be evaluated to determine his/her mental condition.
2. Order Granting Mental Examination - In some jurisdictions, you may be required to prepare the Order granting the requested mental examinations. This form includes the basic language typically required for such orders.
3. Motion for Hearing on Competency - Following the requested examinations, the trial court is required to make a finding on the issue of the defendant's competency. A defendant may then request that the court conduct a hearing on this finding. West Virginia Code, § 27-6A-1(d) and § 27-6A-2.
4. Motion for Examination by Independent Expert - If a defendant requests a competency hearing, the defendant may also request an examination by an independent expert (of the defendant's choice), and to have such expert's testimony presented at the hearing. West Virginia Code, § 27-6A-2(a).
5. Motion for Competency Review Hearing - In some instances, a defendant who has previously been found incompetent may regain competency. A defendant may then petition the court for a new competency hearing. West Virginia Code, § 27-6A-5.
6. Motion for Hearing on Defense - A defendant who has been found incompetent may wish to assert another defense to the merits of the charges. West Virginia Code, § 27-6A-6 permits a defendant to request that the court conduct a hearing to allow the defendant to present such a defense. The court is not obligated to conduct such a hearing, but if the hearing is held, the court may, upon finding insufficient evidence to sustain the charge dismiss the case.
7. Notice of Insanity Defense - A defendant who wishes to assert a defense of insanity must notify the prosecution, and the clerk of the court, of his/her intention to use this defense. Rule 12.2(a), West Virginia Rules of Criminal Procedure.

8. Notice of Expert Testimony of Defendant's Mental Condition - A defendant intending to use expert testimony regarding his/her mental condition is required to notify the state of such intention. Rule 12.2(b), West Virginia Rules of Criminal Procedure, and 32.03(b)(4), T.C.R.,.
9. Motion for Bifurcated Trial - As noted with the request for a hearing to present a defense, a defendant may wish to assert a defense based on insanity and a defense to the merits of the allegations. A defendant may therefore request a bifurcated trial to present these separate defenses. In order to prevail on such a motion, a defendant must present evidence sufficient in quality and quantity to convince the court that each defense is substantial, and that there is a substantial likelihood of prejudice to the defendant if both defenses are presented at a unitary trial. State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981).
10. Motion for Further Mental Examination - It is not uncommon for a defendant, having been found competent to stand trial, to subsequently begin exhibiting behavior or actions that might cause the court to reconsider its earlier ruling. It is crucial that such actions be brought to the attention of the court. Under such circumstances, it is advisable to request that the court order additional examinations to verify the defendant's competency status. See State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001).
11. Motion for Post-Conviction Examination - Prior to sentencing, a court may order a psychiatric or other such examination to assist the court in making its sentencing determination. West Virginia Code, § 27-6A-1(e).

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR MENTAL EXAMINATION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 27-6A-1, et. seq., as amended, for an examination by one or more psychiatrists, or a psychiatrist and a psychologist, to determine if the Defendant is competent to stand trial and to determine the Defendant's criminal responsibility at the time of the alleged offense.

In support of said motion the Defendant asserts that [*he/she*] may not be criminally responsible by reason of mental illness, mental retardation or addiction, and that [*he/she*] may not be able to participate substantially in, or understand the nature of, the proceedings herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

ORDER GRANTING MENTAL EXAMINATION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and the State of West Virginia, by and through the Office of the Prosecuting Attorney of [*county*] County, West Virginia, for hearing upon the Motion for Mental Examination previously filed by the Defendant herein.

The Court, in consideration of the said Motion, and in consideration of the arguments of Counsel, is of the opinion to **GRANT** said motion. It is therefore the **ORDER** of the Court that the Defendant be examined by one or more psychiatrists, or a psychiatrist and a psychologist, to determine if the Defendant is competent to stand trial and to determine the Defendant's criminal responsibility at the time of the alleged offense.

It is **ORDERED** that the following determinations be made by said mental health professionals:

1. Does the Defendant possess sufficient present ability to consult with [*his/her*] lawyer with a reasonable degree of rational understanding of the proceedings against [*him/her*], and if not, is there a substantial likelihood that [*he/she*] will attain such capacity within six (6) months of this date?
2. At the time of the alleged offense, was the Defendant suffering from mental disease, mental defect or addiction which rendered [*him/her*] substantially incapable to appreciate the wrongfulness of [*his/her*] conduct?

3. If the Defendant was substantially capable of appreciating the wrongfulness of [*his/her*] conduct at the time of the alleged offense, was the Defendant suffering from a mental disease, mental defect or addiction which rendered [*him/her*] substantially incapable of conforming [*his/her*] conduct to the requirements of the law?

At the conclusion of said examinations, said mental health professionals shall prepare a written report to be prepared and submitted to the Court for findings thereon. A copy of said report shall also be submitted to Counsel for the Defendant and to the Office of the Prosecuting Attorney for [*county*] County, West Virginia.

[*include language, if necessary, directing transportation to and from the examinations for incarcerated defendants*].

[*include language, if necessary, mandating payment of such examinations by the Department of Health and Human Services, Behavior Services Division*].

ENTERED this _____ day of _____, 20____.

_____,
JUDGE

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

Office of the Prosecuting Attorney
[*county*] County, West Virginia

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR HEARING ON COMPETENCY

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 27-6A-1(d) and § 27-6A-2, as amended, for a hearing on the findings of the court in regard to the Defendant's competency to stand trial.

In support of said Motion, the Defendant asserts that under West Virginia Code, § 27-6A-1(d) and § 27-6A-2, as amended, the Defendant is entitled to a hearing on the findings of the court within ten (10) days of such finding or within ten (10) days of this motion herein.

Therefore, the Defendant requests that the Honorable Court schedule a hearing within the next ten (10) days on this issue of the Defendant's competency to stand trial in the matter herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR EXAMINATION BY INDEPENDENT EXPERT

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 27-6A-2(a), for an independent examination to determine the Defendant's competency to stand trial.

In support of said Motion, the Defendant asserts that [*he/she*] is entitled to and has requested a hearing in accordance with West Virginia Code, § 27-6A-2, as amended, and that an examination by an independent expert, and testimony from such expert, is necessary for said hearing.

[*include language, if necessary, mandating payment of such examination by the West Virginia Department of Health and Human Resources, Behavior Services Division, in accordance with § 27-6A-8(b)*].

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR COMPETENCY REVIEW HEARING

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 27-6A-5, as amended, to schedule a hearing to review the status of the Defendant's competency to stand trial.

In support of said Motion, the Defendant asserts that [*he/she*] was previously found incompetent to stand trial on [*date of incompetency finding*], but that the defendant is now competent to stand trial and requests the termination of [*his/her*] commitment and return to the court for further proceedings.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR HEARING ON DEFENSE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 27-6A-6, as amended, for a hearing to permit the Defendant to assert a defense which is not based on mental disease, mental defect or addiction.

In support of said motion, Counsel asserts that while the Defendant has been found incompetent to stand trial, the Defendant believes that [*he/she*] can establish a defense on the merits of the pending charges.

Therefore, the Defendant requests that the Honorable Court schedule a hearing and permit the Defendant to establish a defense to the charges herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

NOTICE OF INSANITY DEFENSE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 12.2(a) of the West Virginia Rules of Criminal Procedure and Rule 32.03(b)(4) of the Trial Court Rules, does hereby provide notice of the Defendant's intention to offer a defense of insanity at the time of the offense alleged herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

NOTICE OF EXPERT TESTIMONY
OF DEFENDANT'S MENTAL CONDITION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 12.2(b) of the West Virginia Rules of Criminal Procedure and Rule 32.03(b)(4) of the Trial Court Rules, does hereby provide notice of the Defendant's intention to use expert testimony relating to the Defendant's mental condition, and in particular any mental disease, mental defect or addiction bearing upon the issue of the Defendant's guilt for the charges herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR BIFURCATED TRIAL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Good v. Handlan, 176 W.Va. 145, 342 S.E.2d 111 (1986), State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981) and State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981), to order a bifurcated trial in the matter herein.

In support of said motion, the Defendant asserts that he has a substantial insanity defense and a substantial defense on the merits of the charges herein, either of which would be harmed by a unitary trial.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR FURTHER MENTAL EXAMINATION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 27-6A-1(a) and State v. Sanders, 209 W.Va. 367, 549 S.E.2d 40 (2001), to order such additional examinations as may be deemed necessary to determine if the Defendant remains competent to stand trial.

In support of said motion, the Defendant asserts that [*he/she*] was previously found competent to stand trial on [*date of competency finding*], but that there is presently new evidence casting serious doubt on the validity of the earlier competency finding, or that there has been an intervening change of circumstances that renders the prior determination an unreliable gauge of present mental competency, as indicated by the following: [*list factors, i.e., new evidence or intervening change of circumstances, indicating need for additional examinations*].

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR POST-CONVICTION EXAMINATION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 27-6A-1(e), for a psychiatric or other clinical examination of the Defendant, and if necessary, for a period of observation in a mental health facility designated by the Director of Health and Human Services.

In support of said motion, the defendant asserts that such examination or period of observation will assist the court in determining its sentence to be imposed herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

F. DISQUALIFICATION, RECUSAL AND WITHDRAWAL

Comments

1. Motion for Disqualification of Judge - Judges may be disqualified from presiding over a criminal matter for various reasons, among which are bias and prejudice [either for or against the defendant], interest in the outcome of the trial, or a relationship to a party or interested person involved in the trial. F. Cleckley, *West Virginia Criminal Procedure*, Chapter XXIV.

The procedure by which a judge may be disqualified from a particular case is set forth in W.Va. Code § 51-2-8 and T.C.R. Rule 17.01. In the event that a judge does not voluntarily step aside from a case (T.C.R. 17.02), the party seeking disqualification must file a written motion setting forth the specific grounds for disqualification as noted in the Code of Judicial Conduct. This motion must be accompanied by a verified certificate from counsel setting forth, in essence, that counsel's motion is made in good faith.

2. Certificate of Counsel in Support of Motion for Disqualification of Judge - See # 1 above.
3. Motion to Recuse the Office of the Prosecuting Attorney and for Appointment of Special Prosecutor - As with a circuit judge, there are procedures by which a prosecuting attorney may be removed from acting in a particular case. West Virginia Code, § 7-7-8, as amended. It has generally been held that a prosecutor may be recused from a particular case when (1) a prosecutor has had some attorney-client relationship with the parties involved where he/she obtained privileged information in regard to the defendant, or (2) when the prosecutor has some direct personal interest, kinship or close friendship that his/her objectivity and impartiality may be questioned. F. Cleckley, *Handbook on West Virginia Criminal Procedure*, Chapter XXV.

If the court finds adequate grounds for removal of the prosecuting attorney, the prosecutor's assistants are likewise disqualified from proceeding in the matter. Moore v. Starcher, 167 W.Va. 848, 280 S.E.2d 693 (1981). The circuit court must then appoint a special prosecutor to pursue the matter. The county commission must pay the fees of the special prosecutor.

4. Motion to Withdraw from Representation - T. C. R. 4.03(b) sets forth the procedure by which counsel may withdraw from a particular case. Withdrawal may be requested for a number of reasons, but in any instance withdrawal must be requested from and approved by the court.
5. Certificate of Counsel in Support of Motion to Withdrawal - Counsel must, in accordance with Rule 4.03(b), prepare a written notification certificate verifying that he/she has followed the notification requirements set forth in the rule.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR DISQUALIFICATION OF JUDGE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code § 51-2-8, as amended, and Rule 17.01 of the Trial Court Rules, for disqualification of the judge assigned to the matter herein.

In support of said motion, Counsel asserts the following: [*state particular facts and rationale supporting the motion, including the specific provision of Canon 3(E)(1) of the Code of Judicial Conduct asserted to be applicable*].

Therefore, the Defendant requests that the Honorable Court grant this motion and refer the matter herein for assignment to another judge.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

CERTIFICATE OF COUNSEL
IN SUPPORT OF MOTION FOR DISQUALIFICATION

I, [*counsel's name*], Counsel for the Defendant herein, verifies and affirms the following :

1. That I prepared and have read the attached Motion for Disqualification;
2. That to the best of my knowledge, information and belief formed after a reasonable inquiry, the motion is well grounded in fact and is warranted by existing law or by a good-faith argument for the extension, modification or reversal of existing law;
3. That there is evidence in the matter herein sufficient to support disqualification; and
4. That this motion is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

[*counsel*]

STATE OF WEST VIRGINIA,
COUNTY OF [*county*], to-wit:

I, [*counsel's name*], being first duly sworn, does hereby state that the facts and allegations contained in the foregoing motion are true, except so far as they are stated to be based upon information and belief, and that so far as they are stated to be based upon information and belief, are believed to be true.

[*counsel*]

Taken, sworn to and subscribed before me this _____ day of _____, 20____.

Notary Public

My Commission expires _____.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**MOTION TO RECUSE THE OFFICE OF THE
PROSECUTING ATTORNEY AND FOR
APPOINTMENT OF SPECIAL PROSECUTOR**

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 7-7-8, as amended, for recusal of the Office of the Prosecuting Attorney of [*county*] County and for appointment of a special prosecuting attorney.

In support of said motion, Counsel for the Defendant asserts that the Office of the Prosecuting Attorney of [*county*] cannot legally and/or ethically proceed with the prosecution of this case for the following reason[s]: [*list specific facts for prosecutorial disqualification*].

Therefore, the Defendant requests that the court schedule a hearing on this motion and, at the conclusion of this hearing, grant the relief requested herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO WITHDRAW FROM REPRESENTATION

On this date came [*counsel's name*], Counsel for the Defendant herein, and pursuant to Rule 4.03(b) of the Trial Court Rules, does hereby move the Honorable Court to permit Counsel to withdraw from further representation in the captioned matter.

In support of said Motion, Counsel asserts the following:

1. [*state reasons for withdrawal and attach any necessary documentation*];
2. That the Defendant, [*name*], has been notified of Counsel's proposed withdrawal;
3. That the Defendant [*does/does not*] object to Counsel's proposed withdrawal; and
4. [*state whether arrangements have been made for substitute counsel*].

Therefore, Counsel for the Defendant requests that a hearing be held on this Motion and that the Court grant the relief sought herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**CERTIFICATE OF COUNSEL
IN SUPPORT OF MOTION FOR WITHDRAWAL**

I, [*counsel's name*], Counsel for the Defendant herein, do hereby certify in accordance with Rule 4.03(b) of the Trial Court Rules, that I have provided the Defendant herein with notice of the following:

1. That I am required and/or wish to withdraw from the captioned matter;
2. That the court retains jurisdiction of the captioned matter;
3. That the client has the burden of keeping the court informed where notice, pleadings or other papers may be served;
4. That the client has the obligation of preparing for trial or hiring other counsel to prepare for trial when the trial date has been set;
5. That the client has been advised of the possible adverse effects of failure or refusal to meet these burdens;
6. That the date of any proceedings, including trial, and the holding of any such proceedings will not be affected by the withdrawal of any counsel;
7. That service of process may be made upon the client at the client's last known address;
and
8. That the client has a right to object immediately to my intent to withdraw.

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

G. CONSOLIDATION, SEVERANCE AND BIFURCATION

Comments

1. Motion for Consolidation of Charges - Under R.Cr.P. 8, multiple offenses or defendants may be joined in the same indictment or information. If there has been no joinder, a defendant may ask that the circuit court consolidate two or more charges to permit the defendant to address all of the charges in a single trial. The circuit court cannot order a joint trial of more than one defendant in a felony case if a defendant or the state objects. R.Cr.P. 13.
2. Motion for Severance of Offenses - If a defendant will be prejudiced by joinder of offenses in a multiple-count indictment, he/she may request that one or more of the charges be severed and that separate trials be conducted for these charges. The motion for severance is typically made when (1) a defendant has separate defenses for separate charges; (2) a defendant wishes to testify regarding one charge, but not another; (3) the state's evidence is disparate, i.e., strong on a certain charge but weak on another; and (4) the cumulative effect of the evidence from more than one offense may cause the jury to infer guilt on all offenses. It is generally useful to review the joinder requirements of R.Cr.P. 8(a) and attempt to demonstrate that the initial joinder was improper. R.Cr.P., 14(a).

Severance of offenses is particularly advisable in the context of DUI litigation. In State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001), the court held, inter alia, that upon request of a defendant, the trial of DUI charges and Driving on a Revoked License-DUI Related charges should ordinarily be severed, when such severance is necessary to avoid unfair prejudice. As an example, if a defendant is charged with DUI-Third Offense and Driving on a Revoked License, DUI-Related, counsel may wish to request bifurcation of the prior offenses under State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999). If this motion is made, counsel should move for severance of the charges, because any reference to the defendant having a license revoked for DUI will clearly defeat the purpose of bifurcation.

3. Motion for Separate Trial [felony] - Following joinder of defendants in the same indictment or information under Rule 8(b), a defendant may demand a separate trial from the co-defendant. Rule 14(b) states that in a felony case, a court "shall" order separate trials if requested by either of the defendants or the state.
4. Motion for Separate Trial [misdemeanor] - A defendant charged along with a co-defendant with misdemeanor offenses may request a separate trial. However, unlike the demand made in felony cases, it is within the court's discretion whether to grant a separate trial in misdemeanor cases. A defendant seeking a separate trial in a misdemeanor case must make a showing of prejudicial joinder in order to be granted a separate trial. R.Cr.P., 14(b).

5. Motion for Bifurcated Trial [mercy issue] - In cases where the jury will make the sentencing determination of whether to grant mercy [chiefly in murder and kidnapping cases], a defendant may request a bifurcated trial. The jury will first make the determination of guilt or innocence, and then at a separate proceeding make the determination of whether to grant mercy. The decision of whether to grant a bifurcated trial rests within the discretion of the court, and a party must show “compelling prejudice” to show an abuse of discretion. Either the defendant or the state may request bifurcation, and the burden of persuasion is placed upon the moving party. In State v. Larock, 196 W.Va. 294, 470 S.E.2d 613 (1996) the Court addressed a number of circumstances that the trial court should consider in determining whether to grant bifurcation, including the effectiveness of limiting instructions, admissibility of evidence for sentencing and trial purposes, and whether bifurcation unreasonably would lengthen the trial.
6. Motion for Bifurcated Trial [prior convictions] - A frequent problem which arises in cases such as Driving Under the Influence-Third Offense or similar offenses is when a defendant wishes to contest the validity of the prior convictions. In a unitary trial, the jury will of course hear all of this evidence together and could decide guilt based upon the “repeat offender” inference. In State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999), the Court approved the procedure whereby a defendant can request that the trial court bifurcate the issue of prior convictions from that of the underlying charge and hold separate jury proceedings for both matters. The court’s decision to grant bifurcation is discretionary, and is based upon whether the defendant can demonstrate a meritorious claim that challenges the legitimacy of the prior conviction.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR CONSOLIDATION OF CHARGES

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 8(a) and Rule 13 of the West Virginia Rules of Criminal Procedure to order that the following matters be consolidated for a single trial: [*state name and case number of matters sought to be consolidated*].

In support of said motion, Counsel asserts that a single trial in the matters listed will promote judicial economy and will not unduly prejudice the parties herein.

The Defendant therefore requests that the Honorable Court grant the relief sought in this motion and consolidate the matters herein for a single trial.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR SEVERANCE OF OFFENSES

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 14(a) of the West Virginia Rules of Criminal Procedure, to order that the offenses charged in the indictment herein be severed and that separate trials be conducted for the offenses charged.

In support of this motion, Counsel asserts that the Defendant is prejudiced by the joinder of the charges contained in the indictment for the following reasons: [*list counts requested to be severed, and state all reasons that a joint trial is prejudicial*].

Therefore, the Defendant requests that the Honorable Court sever the charges as requested in this motion and require the State of West Virginia to elect which particular count[s] that the State wishes to try in the first trial.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR SEPARATE TRIAL [Felony]

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-3-8 and Rule 14(b) of the West Virginia Rules of Criminal Procedure, to grant the Defendant a separate trial in the captioned matter.

In support of this motion, the Defendant asserts that [*he/she*] has been charged in a joint indictment with [*co-defendant*], and that Rule 14(b) requires that in a felony case, the court grant a separate trial upon request of a party.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR SEPARATE TRIAL [Misdemeanor]

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 14(b) of the West Virginia Rules of Criminal Procedure, to grant the Defendant a separate trial in the captioned matter.

In support of this motion, the Defendant asserts that [*he/she*] has been charged in a joint indictment with [*co-defendant*], and that the Defendant would be unduly prejudiced by a joint trial with [*co-defendant*] for the following reason: [*state reasons why joint trial is prejudicial*].

Therefore, the Defendant requests that the Honorable Court grant a separate trial in the captioned matter.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR BIFURCATED TRIAL [Mercy Issue]

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-3-15, as amended, and State v. Larock, 196 W.Va. 294, 470 S.E.2d 613 (1996), for a bifurcated trial with respect to the issues of guilt and mercy.

In support of this motion, Counsel asserts that a unitary trial on the issues of guilt and mercy in this matter would be unfairly prejudicial and fundamentally unfair for the following reasons: [*state reasons for bifurcation, with particular emphasis on why such reasons demonstrate the prejudicial effect of a unitary trial*].

Therefore, the Defendant requests that the Honorable Court conduct a bifurcated trial on the issue of guilt and mercy in the matter herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR BIFURCATED TRIAL [Prior Convictions]

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999), for a bifurcated trial with respect to the prior convictions alleged in the indictment in this case.

In support of this motion, Counsel asserts that the Defendant intends to contest the existence and/or validity of the prior convictions alleged herein, and that a unitary trial will reveal the existence of these prior offenses to the jury and effectively prohibit the Defendant from presenting a defense to the underlying charge herein.

Therefore, the Defendant requests that the Honorable Court schedule a hearing on this motion and, at the conclusion of such hearing, grant the relief requested in the motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

H. MISCELLANEOUS PRE-TRIAL MOTIONS

Comments

1. Motion for Speedy Trial [One Term Rule] - W.Va. Code § 62-3-1 states that an accused who has been indicted for a felony or misdemeanor is entitled, “unless good cause be shown for a continuance, (to) be tried at the same term”. A defendant must assert his or her right to a speedy trial by a written motion in order to assert the one-term rule. Keller v. Ferguson, 177 W.Va. 616, 355 S.E.2d 405 (1987). In the absence of good cause for a continuance or a trial, a defendant who has asserted the right to a speedy trial and has been denied a trial within the first term following indictment or information should request dismissal of the charges.
2. Motion for Dismissal Due to Failure to Provide Speedy Trial [Three-Term Rule] W.Va. Code § 62-3-21 is generally considered to be the legislative enactment of the W.Va. Constitution, Article III, § 14 guarantee of a speedy trial. Essentially, § 62-3-21 guarantees that a defendant will be tried within three (3) terms of the indictment. Since the term of indictment is not counted, the rule requires the passage of four (4) full terms before the rule can be invoked. State v. Dillon, 191 W.Va. 648, 447 S.E.2d 583 (1994); State v. Crawford, 83 W.Va. 556, 98 S.E. 615 (1919). Any of the exceptions stated in § 62-3-21, or continuances requested by the defendant, can act to defeat a three-term rule motion. It is, however, very clear that dismissal of the indictment with prejudice is the appropriate remedy for a violation of the three-term rule.
3. Motion for Speedy Trial [Magistrate Court] - In State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982), the Court held the speedy trial guarantees of W.Va. Code § 62-3-1 [one term rule] and § 62-3-21 [three-term rule] applicable to magistrate courts. A defendant charged in magistrate court is entitled to be tried within one hundred twenty (120) days of the service of criminal warrant. The Court modified this holding somewhat in State ex rel. Miller v. Fury, 172 W.Va. 580, 309 S.E.2d 79 (1983), holding that before a magistrate can dismiss a case for a violation of the 120 day rule, the magistrate must find that (1) there was no good cause for continuance, (2) that the state has deliberately or oppressively sought to delay the trial beyond the 120 period, and (3) that the delay has resulted in substantial prejudice to the accused.
4. Motion for Dismissal Due to Unnecessary Pre-Indictment Delay - Under R.Cr.P. 48(b), the trial court shall dismiss, on its own motion, an indictment, information or complaint if there has been an “unnecessary” delay of more than one (1) year in presenting the charge to a grand jury or in filing the information. This situation is frequently encountered when a defendant’s case has been “bound-over” to the grand jury following a preliminary hearing, but has not yet been presented to the grand jury. Because the dismissal is without prejudice, the State is not foreclosed from re-filing the charges.

5. Petition for Habeas Corpus Relief [Two-Term Rule] - The “two-term” rule in W.Va. Code, § 62-2-12 is designed to provide relief for defendants from preindictment delay. Specifically, the rule states that a person “shall be discharged from imprisonment if he be not indicted before the end of the second term of the court[.]” The Court has stated that a petition for habeas corpus is the appropriate mechanism to secure the release of the defendant. Ex parte Blankenship, 93 W.Va. 408, 116 S.E. 751 (1923).
6. Motion for Leave to File Additional Motions - Under T. C. R. 36.03, trial courts have discretion regarding the time periods for filing motions. Depending on the particular practice of the circuit, it may be advisable to seek the permission of the court to file additional motions as the need arises.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR SPEEDY TRIAL
(ONE TERM RULE)

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to West Virginia Code, § 62-3-1, as amended, and Keller v. Ferguson, 177 W.Va. 616, 355 S.E.2d 405 (1987), moved the court for a trial on the captioned matter within the present term of the court.

In support of this motion, counsel asserts that the Defendant was indicted in the [*name of term*] term of the circuit court, and pursuant to Keller v. Ferguson would by this motion request a trial within the same term of court.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**MOTION FOR DISMISSAL DUE TO
FAILURE TO PROVIDE SPEEDY TRIAL
[THREE TERM RULE]**

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to West Virginia Code, § 62-3-21, as amended, Rule 37.02 of the Trial Court Rules, and Good v. Handlan, 176 W.Va. 145, 342 S.E.2d 111 (1986), moved the court to dismiss the matter herein with prejudice due to the state's unjustifiable failure to try the Defendant within three (3) terms of the court.

In support of said motion, the Defendant asserts the following:

- (1). That [*he/she*] was indicted on [*date*], during the [*name of term*] term of the court;
- (2). That excluding the initial term of the indictment, more than three [3] terms of the court have passed since the indictment;
- (3). That none of the exceptions stated in § 62-3-21 are applicable in the present case; and
- (4). That pursuant to State ex rel. Holstein v. Casey, 164 W.Va. 460, 265 S.E.2d 530 [1980], *overruled on other grounds*, State ex rel. Shorter v. Hey, 170 W.Va. 249, 294 S.E.2d 51 [1981], the only remedy available for a denial of the Defendant's speedy trial right is dismissal with prejudice.

Therefore, the Defendant requests that the court grant the relief sought herein and dismiss this matter with prejudice.

[*defendant*],

By Counsel

[*counsel name and bar #*]

[*address*]

Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**MOTION FOR SPEEDY TRIAL
[MAGISTRATE COURT]**

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to West Virginia Code, § 62-3-1, as amended, and State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 [1982], does hereby move for and demand that a speedy trial be conducted within one hundred twenty [120] days of the service of the warrant herein upon the Defendant.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**MOTION FOR DISMISSAL DUE TO
UNNECESSARY PRE-INDICTMENT DELAY**

Comes now the Defendant, [*name*], by and through [*his/her*] Counsel, [*counsel name*], and pursuant to Rule 48(b) of the West Virginia Rules of Criminal Procedure, does hereby move that the Honorable Court dismiss the [*indictment, information or complaint*] pending herein.

In support of this Motion, Counsel asserts the following: [*list facts supporting motion, including date of initial charge, date and result of preliminary hearing, and current procedural status of case*]. The Defendant asserts that the delay by the State of West Virginia has acted and is acting to the prejudice of the Defendant, and is depriving the Defendant of his rights under the Due Process Clause of the Fifth Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution.

Therefore, the Defendant requests that the Honorable Court grant this motion and dismiss the matter herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**PETITION FOR HABEAS CORPUS RELIEF AND FOR DISMISSAL
DUE TO FAILURE TO PROVIDE SPEEDY TRIAL
[TWO TERM RULE]**

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to West Virginia Code, § 62-2-12, as amended, moved the Honorable Court to dismiss the matter herein and Order the immediate release of the Defendant from custody.

In support of said motion, the Defendant asserts the following:

- (1). That the Defendant was arrested on [*date*] and charged with [*offense[s]*];
- (2). That the Defendant was incarcerated on [*date*], and has been continuously incarcerated since that time;
- (3). [*state date and results of preliminary hearing*];
- (4). That West Virginia Code, § 62-2-12, as amended, states that a person incarcerated on a criminal charge shall be discharged from imprisonment if he or she is not indicted before the end of the second term of court; and
- (5). That more than two (2) terms of the court have passed, and the Defendant is therefore entitled to release from custody and dismissal of the matter herein.

Therefore, the Defendant requests that the Court grant the relief requested in the petition herein and Order that the Defendant be released from custody, and further request that the court dismiss the matter herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to Rule 47 of the West Virginia Rules of Criminal Procedure did move the Honorable Court for leave to file any additional motions as may be deemed necessary by the Defendant herein.

In support of said motion, counsel asserts that additional matters may come to the attention of counsel during trial preparation which may necessitate the filing of additional motions.

The Defendant therefore requests that the Honorable Court grant the Defendant leave to file any additional motions as may be deemed necessary by the Defendant in the matter herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

II. TRIAL AND RELATED MOTIONS

A. PLEA DOCUMENTS

Comments

1. Summary of Plea Agreement - Typically in many counties, the prosecution will prepare a written plea agreement which is signed by the defendant and entered into the court record. However, not all prosecutors follow this procedure. It is therefore advisable for counsel to make certain that all of the relevant provisions of a plea agreement are reduced to writing and entered in to the record. This procedure serves as a protection for the client in the event of confusion as to any terms of the agreement, either on the part of the court, the prosecutor or the client.
2. Statement of Counsel in Support of Guilty Plea - At the time of a plea, the trial court is required to make necessary inquiries of the client on the record regarding the circumstances of the plea. When a client is entering a plea of guilty [or nolo contendere], it is important that the record reflect that the client has been fully and competently represented by the attorney. Many courts conduct an inquiry of the attorney at this time, and may question the attorney as to the extent of the representation and the nature of the attorney's advice to the client. Regardless of the procedure, it may be helpful to the court, the client and the attorney if the record contains a written statement of counsel as to the extent of the representation.
3. Motion to Withdraw Plea - Prior to sentencing, a client may move to withdraw a plea of guilty or nolo contendere. R.Cr.P. 32(e) states that this withdrawal may be permitted by the trial court upon a showing of any "fair and just reason" for the withdrawal. Attempting to specifically define a "fair and just reason" is difficult, and will depend upon the particular circumstances of the case. There is consensus that the primary justifications for the withdrawal of a plea include issues that essentially challenge the fairness of the plea proceeding, or the fulfillment of a promise or condition emanating from the plea proceeding. Cleckley, *Handbook on West Virginia Criminal Procedure*, Second Edition, pp.I-835. [Requests to withdraw a guilty or nolo contendere plea *after* the imposition of sentence can only be accomplished on direct appeal or by seeking habeas corpus relief under W.Va. Code § 53-4A-1, et. seq.,].

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

SUMMARY OF PLEA AGREEMENT

On this date came the Defendant, [*name*], with [*his/her*] Counsel, [*counsel's name*], and did present to the court this Summary of Plea Agreement which has been agreed to between the parties herein.

(1) [*list separately all provisions of plea agreement, including specific offense, sentencing options*]
[*including minimum and maximum sentences*], state's position regarding sentencing, and all other
[*pertinent provisions of the plea agreement*]

(2) It is further understood that the provisions listed herein constitute the entire agreement between the Defendant, [*name*], and the State of West Virginia.

Dated this _____ day of _____, 20____.

Defendant

Date

Prosecuting Attorney

Date

Counsel for Defendant Date

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**STATEMENT OF COUNSEL FOR DEFENDANT
IN SUPPORT OF PLEA OF GUILTY**

(1) Were you appointed by the Court to represent this defendant or are you privately retained by the defendant? _____

(2) Have you had an ample opportunity to prepare any and all possible defenses for the defendant? _____

(3) Have you met with the defendant concerning his/her case and fully reviewed with the defendant his/her possible defense[s]? _____

(4) Have you explained to the defendant each and every element of the charge[s] for which the defendant was indicted? _____

(5) Have you explained to the defendant his/her constitutional rights to a trial by jury and all of his/her other constitutional rights? _____

(6) Have you fully explained to your client the consequences of entering a plea of guilty, including all sentencing options and other pertinent information? _____

(7) In your opinion, does your client fully understand the offense to which he/she is pleading guilty? _____

(8) Have you made an investigation of the charges contained in the indictment? _____

(9) In your opinion, is the admissible evidence available to the state and disclosed to you in this case sufficient to support a guilty verdict for the offense for which the plea is offered or any other offense included offense? _____

(10) Have you disclosed to and discussed with the defendant all of the evidence available to the state in this case? _____

STATE OF WEST VIRGINIA VS. _____, CASE # _____

(11) If applicable, have you reviewed with the defendant any written defendant's statement in support of this guilty plea? _____

(12) If so, did the defendant write the answers in his/her own handwriting? _____

(13) If not, did you write the answers for him/her, and did you provide him/her the opportunity to fully review the answers? _____

(14) Has there been any plea bargaining or plea negotiations in this matter? _____

(15) If the answer to #14 is "yes", has the bargain or agreement been reduced to writing in its entirety and filed in this case? _____

(16) If the answer to #15 is "no", please set forth all of the pertinent provisions of the plea bargain or plea negotiation. _____

(17) In your opinion and based upon your observations, was your client under the influence of drugs or any other controlled substance at the time of the completion of his/her written statement in support of guilty plea? _____

(18) Do you know of any reason whatsoever, whether as a matter of law or otherwise, that the defendant should not enter his/her plea of guilty at this time? _____

Counsel for Defendant

STATE OF WEST VIRGINIA VS. _____, CASE # _____

STATE OF WEST VIRGINIA,
COUNTY OF _____, TO-WIT:

Taken, subscribed and sworn to before the undersigned authority by _____
_____, Counsel for the Defendant herein, in the State and County aforesaid on
this _____ day of _____, 20____.

My Commission expires _____.

NOTARY PUBLIC

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO WITHDRAW PLEA

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 32(e) of the West Virginia Rules of Criminal Procedure and Duncil v. Kaufman, 183 W.Va. 175, 394 S.E.2d 870 (1990) to withdraw the plea of [*guilty/nolo contendere*] previously tendered by the Defendant herein.

In support of said Motion, the Defendant asserts that the following facts constitute fair and just reasons as to why the Defendant should be permitted to withdraw [*his/her*] plea: [*cite any and all reasons supporting defendant's request to withdraw guilty/nolo contendere plea*].

The Defendant therefore requests that the Honorable Court grant the relief sought in the motion herein and permit [*him/her*] to withdraw the plea previously offered herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

B. MOTIONS REGARDING THE JURY

Comments

1. Motion to Challenge Jury Selection Procedure - If a party wishes to challenge the manner in which the jury pool was selected, the party [either the state or the defendant] must file a motion within seven days after the party learns, or by the exercise of due diligence should have learned, of the grounds for the motion. The motion must be made prior to the selection of the jury. It is necessary that the motion include a certification or affidavit setting forth the grounds for the motion. The moving party must show a substantial failure to comply with the procedures for jury selection set forth in the Code. See W.Va. Code, § 52-1-1, et. seq.
2. Motion for Change of Venue - This motion is most commonly seen in high-profile felony cases where there has been a substantial amount of pretrial publicity surrounding the defendant. The primary purpose of the motion is to assure that the defendant's case is heard by a jury that has not been tainted by prejudicial information about the case. This motion should be filed in any instance where, "because of the dissemination of potentially prejudicial material there is a reasonable likelihood that in the absence of such relief a fair trial cannot be had." Cleckley, *Handbook on West Virginia Criminal Procedure*, Second Edition, pp. I-842, (1993). Only the defendant can request a change of venue. W.Va. Code, § 62-2-13.
3. Motion for Change of Venire - As an alternative to the motion for a change of venue, the motion for change of venire is a request to bring qualified jurors from another county to preside in the case. As with a change of venue, the goal is essentially the same: to allow the trial to proceed with jurors who have not been exposed to prejudicial material about the case. However, unlike a change of venue, either party may request a change of venire. W.Va. Code, § 52-1-20.
4. Motion for Sequestration of Jury - Either party in a criminal case may move for sequestration for the jury for the duration of a trial. In State v. Young, 173 W.Va. 1, 311 S.E.2d 118 (1983), the Court set forth a number of factors that must be proven to the trial court in order to determine whether the jury should be sequestered, including prejudicial pretrial publicity, public sentiment, and the pervasiveness of media coverage of the trial. Either party may request sequestration, and the trial court's decision whether to grant sequestration is subject to an abuse of discretion analysis.
5. Motion to Conduct Voir Dire - The basic purpose of voir dire is to assure that an unbiased jury is selected for the trial. State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1989). The primary responsibility for voir dire lies with the trial court; but under T. C. R. 42.03, the attorneys conducting the case "shall" be permitted to ask voir dire questions, unless the trial court finds that there are justifiable reasons to deny such attorney voir dire. This rule marks an expansion of R.Cr.P. 24(a), which states that the trial court "may" allow such attorney-conducted voir dire. The trial court is vested with considerable latitude in determining the extent of voir dire questions, and its decision is subject to an abuse of discretion standard. In some instances, individual voir dire of the

jurors may be required, but the Court has stated that individual voir dire is only required when prospective jurors indicate possible areas of bias or prejudice. See Michael v. Sabato, 192 W.Va. 585, 453 S.E.2d 419 (1994).

6. Motion for Use of Jury Questionnaire - As with individual voir dire, the decision to permit the use of a jury questionnaire is within the trial court's discretion. However, if the trial court has denied attorney-conducted voir dire, a more compelling argument can be made for the use of the jury questionnaire. The basic authority for the use of such questionnaires is found in R.Cr.P. 24(a), which permits "further inquiry" during voir dire when the court has elected to conduct its own voir dire examination. A sample "Juror Personal History Questionnaire" is included in this volume, but the precise nature and format of the questionnaire is subject to change depending on the particular facts and circumstances of your case.
7. Motion for a Jury View - Depending on the facts of a given case and the potential defense, it may be strategically valuable to place the jurors at the scene of the alleged crime. At the request of either party, the jurors in a particular case may be taken to view the premises, property or location relevant to the trial. The decision of whether to grant a jury view is discretionary. W.Va. Code, § 56-6-17.
8. Motion to Waive Jury Trial - A defendant's right to a jury trial is well-established. Conversely, if a defendant wishes to waive his right to a jury trial, he/she must secure the consent of the prosecution and the approval of the court. R.Cr.P., 23.
9. Reservation and Motion for Jury Trial [Magistrate Court] - A defendant facing criminal charges in magistrate court faces strict time guidelines for requesting a jury trial. *A defendant must request a jury trial either (1) within 20 days after the initial appearance or (2) within 20 days after counsel is appointed to represent the defendant.* Clearly, it is incumbent on the criminal attorney to promptly discern the client's wishes in this regard and, if requested, file a motion for jury trial as soon as possible. Once the request for a jury trial is made, it may not be withdrawn if the prosecuting attorney objects to the withdrawal. R.Cr.P. Mag.Ct., 5(c). In the event that a defendant has not made a timely request for a jury trial, he/she is entitled to a hearing on the issue so as to create an adequate record as to whether the untimely request resulted from an intentional, knowing and voluntary relinquishment of the right by the defendant. Syllabus Point 7, State ex rel. Callahan v. Santucci, 210 W.Va. 483, 557 S.E.2d 890 (2001).

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO CHALLENGE JURY SELECTION PROCEDURE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 52-1-15, as amended, to permit the Defendant to present [*his/her*] challenge to the jury selection procedures utilized in obtaining the pool of prospective jurors for the matter herein.

In support of said motion, the Defendant asserts that the procedures utilized in determining the selection of the jurors were fatally defective and constitute a substantial failure to comply with the provisions of West Virginia Code, § 52-1-1, et. seq., as amended. The Defendant further asserts that the attached certification contains a sufficient sworn statement of facts to support this motion.

Therefore, the Defendant requests that the court stay further proceedings in this matter and schedule a hearing on the motion herein, and further grant any other such relief as the court may deem appropriate.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**STATEMENT IN SUPPORT OF MOTION TO
CHALLENGE JUROR SELECTION PROCEDURES**

I, [*counsel's name*], Counsel for the Defendant herein, do hereby verify and affirm the following:

1. [*cite any and all facts showing substantial failure to comply with provisions of §52-1-1, et. seq.,*].

[*counsel*]

STATE OF WEST VIRGINIA,
COUNTY OF [*county*], to-wit:

I, [*counsel's name*], being first duly sworn, says that the facts and allegations contained in the foregoing motion are true, except so far as they are stated to be based upon information and belief, and that so far as they are stated to be based upon information and belief, are believed to be true.

[*counsel*]

Taken, sworn to and subscribed before me this _____ day of _____, 20____.

Notary Public

My Commission expires _____.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR A CHANGE OF VENUE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-3-13, as amended, and Rule 21 of the West Virginia Rules of Criminal Procedure, for a change of venue in the captioned matter.

In support of this motion, the Defendant asserts that [*he/she*] cannot obtain a fair and impartial trial in [*county*] County due to the existence of substantial prejudice presently existing against the Defendant, and that such prejudice constitutes good cause for removal of the case herein to another county.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR A CHANGE OF VENIRE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, §52-1-14, as amended, to change the venire of jurors and to summon as many jurors as may be necessary from another county to serve in the captioned matter.

In support of this motion, the Defendant asserts that qualified jurors, free from bias, prejudice or preexisting belief as to the guilt of the Defendant, cannot be conveniently found in this county, and that it is necessary that jurors from another county be summoned to serve in this matter.

Therefore, the Defendant requests that the court summon as many jurors as may be necessary for a trial in this matter from another county.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR SEQUESTRATION OF JURY

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-3-6, as amended, and State v. Young, 173 W.Va. 1, 311 S.E.2d 118 (1983), for sequestration of the jury in the trial of the captioned matter.

In support of this motion, the Defendant asserts that sufficient circumstances exist under § 62-3-6 and State v. Young to justify the sequestration of the jury until the jury agrees to a verdict or until the jury is discharged by the court. These circumstances include the following:

(1) [*cite any and all factors under Young justifying sequestration*]

Therefore, the Defendant requests sequestration of the jury in the trial of the captioned matter.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO CONDUCT VOIR DIRE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 42.03 of the Trial Court Rules, to permit Counsel for the Defendant to question the prospective jurors during voir dire examination.

In support of this motion, Counsel asserts that Rule 42.03 states that the attorneys conducting the case “shall be permitted to ask voir dire questions of the prospective jury panel members”, and that there are no justifiable reasons to deny such request.

Therefore, Counsel for the Defendant requests that the court permit the attorneys to conduct voir dire examination.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR USE OF JURY QUESTIONNAIRE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 24(a) of the West Virginia Rules of Criminal Procedure and Rule 42.03 of the Trial Court Rules to require all potential jurors in this case to complete the enclosed "Juror Questionnaire" prior to the commencement of voir dire in the present case.

The attached questionnaire provides information which will permit all counsel to make informed challenges to the qualification of potential jurors, thereby facilitating the selection of a fair and impartial jury and reducing the time necessary to complete the voir dire process.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

JUROR PERSONAL HISTORY QUESTIONNAIRE

The questions asked in this form are questions which could be asked in open court. The questionnaire provides the information while preserving a greater degree of privacy for potential jurors. You are required to answer the questions truthfully. The questions must be personally answered by each juror. Do not permit another person to complete answers on your questionnaire. Please read carefully and answer each of the following questions:

1. Name _____ Age _____ Sex _____
[First] [Middle] [Maiden] [Last]

2. Place[s] of residence in the last five (5) years:

City County State

3. Marital status? _____ Has that marital status changed within the last ten years?

_____ If yes, please circle:

Death Divorce Marriage Remarriage

4. Number of children: _____ Children at home: _____

Ages of children: _____

5. Provide the following information for all members of your family or other persons residing with you in your home: [Omit names]

Relationship: Age: Occupation: Employer:

6. Your present occupation and employer: _____

Years employed: _____ List other occupations and employers during the past five (5) years:

7. If you are retired, list your last occupation and employer, and date of retirement:

8. If you are unemployed, circle reason for unemployment:

Choice/Unable to find work/Disabled/Other [Specify]:/

9. If you are not working outside the home, what was your last paid employment?

10. Spouse's name: _____ Age: _____

Previous name: _____

11. Spouse's occupation: _____ Employer: _____

12. If you are a widow or widower, list occupation and employer of deceased spouse:

13. List organizations, fraternal societies, or groups in which you actively participate:

14. Have you ever served as a juror before? _____ If yes, where and when?

Did you serve on criminal cases? _____ Civil cases? _____ Grand jury? _____

15. Have you or any member of your family ever been a witness in a trial? _____

If yes, where and when? _____

Was the trial civil or criminal? _____

16. Have you ever been charged with a crime? _____ Has any member of your family ever been charged with a crime? _____ Have you ever been convicted of a crime? _____ Has any member of your family? _____ If yes, please specify date _____

Court _____ Crime _____

Have you ever been convicted of a crime? _____ If yes, what crime and when?

17. Has any member of your family been a victim of a crime? _____ If yes, what crime and when? _____

Was any arrest ever made in connection with that crime? _____

18. Do you have any uncorrected defects of sight or hearing which prevent you from reading ordinary newsprint or from hearing any ordinary conversation? _____ Specify: _____

19. Do you have any physical or mental impairment or disability which could disqualify you from jury service? _____ Specify: _____

20. Do you know any reason why you should be excused from jury service? _____ Specify: _____

21. Are you an employer? _____ Landlord? _____ Tenant? _____ Homeowner? _____

22. Have you ever studied law? _____

23. What is the highest level of education you have completed? _____

24. Where did you attend high school? _____

College? _____

If you attended college, what were your majors and minors? _____

25. What degrees do you have? _____

26. [Insert name of defendant, date of offense and brief description of offense].

a. Have you read, seen or heard anything about this matter from any source, including but not limited to newspapers, television, radio, your friends, your neighbors, conversations at work, etc.? Yes _____; No _____;

b. If yes, have you formed an opinion of the Defendant's guilt or innocence? _____

c. If yes, what is that opinion? _____

d. Do you know any reason why you could not serve as a fair and impartial juror in this particular case? _____ If yes, please explain in detail: _____

27. Do you have any knowledge of or any relationship with any of the lawyers listed below? _____

Does any member of your family? _____ Do you have personal relationships with any members of their families? _____ Does any member of your family? _____ Do you or does any member of your family have a business relationship with any of these lawyers or any members of their families? _____ If you have answered any of these questions "yes" please check in appropriate spaces below.

<u>Lawyer</u>	<u>Self</u> <u>Personal</u>	<u>Self</u> <u>Business</u>	<u>Family</u> <u>Personal</u>	<u>Family</u> <u>Business</u>
[Insert name or names of attorneys defending case]	_____	_____	_____	_____
	_____	_____	_____	_____

Any other lawyer from the law firm [Insert name of defense firm].

[List all attorneys in defense firm]	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____

Any other lawyer from the [**COUNTY**] County Prosecutor's Office:

[List prosecutor and	_____	_____	_____	_____
all assistant	_____	_____	_____	_____
prosecutors]	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____

28. Do you have any knowledge of or any relationship with DEFENDANT? _____ Does any member of your family? _____ Do you have personal relationships with any member of HIS/HER FAMILY? _____ Does any member of your family? _____

29. Set forth below is an alphabetical list of persons who may appear as witnesses in this case. Please mark the appropriate blank to identify any relationship or knowledge that you or any member of your family may have of that person or any member of that person's family.

<u>Name</u>	<u>Have not</u>	<u>Have</u>	<u>I know or</u>	<u>I know</u>	<u>Member of my family</u>
<u>[Insert</u>	<u>heard of</u>	<u>heard of</u>	<u>have met</u>	<u>family</u>	<u>knows him/her or</u>
<u>names of</u>				<u>member</u>	<u>his/her family</u>
<u>witnesses]</u>					
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

In the manner in which persons are sworn under oath in open court to give truthful answers, I swear that the answers given above are truthful.

Date: _____

[JUROR'S SIGNATURE]

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR A JURY VIEW

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 56-6-17, as amended, to order that the jury be transported to view the following premises, properties or locations:

(1) [*cite location desired for jury view, i.e., "location of crime as alleged in the indictment"*]

Therefore, the Defendant requests that the court grant the motion and order that the jury be transported to view the requested location[s].

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO WAIVE JURY TRIAL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, §56-6-11, as amended, and Rule 23 of the West Virginia Rules of Criminal Procedure, for leave to waive the Defendant's right to a jury trial in the captioned matter.

In accordance with Rule 23, the Defendant does hereby provide to the court [*his/her*] written waiver of [*his/her*] right to a trial by jury.

[*defendant's signature*]

Date

In accordance with Rule 23, the attorney for the State of West Virginia does hereby consent to a trial without a jury.

[*prosecuting attorney signature*]

Date

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE MAGISTRATE COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]

[*client's name*],
DEFENDANT.

RESERVATION OF RIGHT AND MOTION FOR JURY TRIAL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and pursuant to West Virginia Code, § 50-5-8(b), as amended, and Rule 5(c) of the West Virginia Rules of Criminal Procedure for Magistrate Court, does hereby reserve and by this motion does move for a jury trial in the captioned matter.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

C. MOTIONS REGARDING WITNESSES

Comments

1. Subpoena - “A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a magistrate in a proceeding before that magistrate, but it need not be under the seal of the court.” R.Cr.P., 17(a).
2. Subpoena Duces Tecum - “A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion may promptly quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that the books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to trial or prior to the time when they are to be offered into evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.” R.Cr.P., 17(c).
3. Motion to Secure Attendance of Nonresident Witness - West Virginia Code, §62-6A-3 sets forth the basic procedure by which a party may have a material witness, residing in another state, served with a subpoena to attend and testify in a trial. As per R.Cr.P. 17(c), the witness may also be commanded to produce any books, papers, documents or objects for examination. If the client is indigent, you may also request that the court order the payment of costs and fees for the witness from the state.
4. Petition for Writ of Habeas Corpus Ad Testificandum - While seldom a desirable situation, occasionally a material witness for the defense is incarcerated in a jail or prison. The petition for writ of habeas corpus ad testificandum permits a defendant to request the presence of such witness and the witnesses’ transportation to the court.
5. Motion for Deposition of Prospective Witness - “[W]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording or other material not privileged be produced at the same time and place[.]” R.Cr.P., 15(a). The court has narrowly construed the definition of “exceptional circumstances”, holding that neither out-of-state residence nor a witness’ refusal to speak with counsel for the defendant constituted “exceptional circumstances” for a deposition. State v. Ferrell, 174 W.Va. 697, 329 S.E.2d 62 (1985); State ex rel. Spaulding v. Watt, 186 W.Va. 125, 411 S.E.2d 450 (1991).

6. Motion for Appointment of Interpreter - “The court may order the defendant or the state to show cause for appointment of an interpreter. The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the state, as the court may direct.” R.Cr.P., 28(b). Further, under W.Va. Code § 57-5-7, an interpreter can be appointed for both witnesses, parties and jurors who cannot understand or verbally communicate the English language or may otherwise be hearing impaired.
7. Motion for Disclosure of Mental Health Records of [Witness Name] - It is not uncommon in a criminal prosecution for a material witness for the State to have undergone, or to be undergoing, treatment for a mental illness, disease or defect. Depending upon the nature of the illness, disease or defect, serious questions may arise as to the credibility of the witness. W.Va. Code, § 27-3-1, as amended, prohibits disclosure of communications and information obtained in the course of treatment or evaluation of persons suffering from mental illness, disease or defect. However, § 27-3-1(b)(3) provides that such information can be disclosed pursuant to a court order, provided that the court finds that the information contained in the records is sufficiently relevant to outweigh the confidentiality established by the section.

This section does not, however, provide unfettered access to the witness’ mental records. The trial court is required to conduct an *in camera* inspection of the requested records and must make a preliminary finding of relevancy before releasing such records to counsel. Perhaps the key factor in this determination would be the precise nature of the illness, disease or defect. For example, a court might be more inclined to permit disclosure if the witness has been repeatedly diagnosed as a paranoid schizophrenic, as opposed to an isolated diagnosis of slight-to-moderate depression.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

SUBPOENA

You are hereby commanded in the State of West Virginia to summon:

[*name*]
[*street address*]
[*city, state and zip code*]

to provide evidence in the entitled action, in which the State of West Virginia is the plaintiff and [*defendant's name*] is defendant; and to appear personally before Judge [*judge's name*], on the _____ day of _____, 20____ at _____ .m. at the Circuit Court of [*county*] County, West Virginia, at the [*county*] County Courthouse, [*address of courthouse*] West Virginia.

This Subpoena is issued on behalf of the Defendant, [*defendant's name*].

Given under my hand this _____ day of _____, 20_____.

Clerk/ Deputy Clerk

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

SUBPOENA DUCES TECUM

You are hereby commanded in the State of West Virginia to summon:

[*name*]
[*street address*]
[*city, state and zip code*]

to provide evidence in the entitled action, in which the State of West Virginia is the plaintiff and [*defendant's name*] is defendant; and to appear personally before Judge [*judge's name*], on the _____ day of _____, 20____ at _____ .m. at the Circuit Court of [*county*] County, West Virginia, at the [*county*] County Courthouse, [*address of courthouse*] West Virginia, and to bring with you copies of [*state with specificity any and all documents or other tangible exhibits that are requested from the witness*].

This Subpoena is issued on behalf of the Defendant, [*defendant's name*].

Given under my hand this _____ day of _____, 20_____.

Clerk/ Deputy Clerk

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION TO SECURE ATTENDANCE OF NONRESIDENT WITNESS

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-6A-3, as amended, to issue a certificate under the seal of the court stating that [*witness name*] is a material witness in the trial of the matter herein; that [*he/she*] will be required to attend these proceedings for [*# of days*]; and that [*he/she*] will be required to appear at [*date, time and location of trial*].

The Defendant would furthermore request that, in accordance with West Virginia Code, § 62-5-1, as amended; West Virginia Code, §§ 59-1-16 and 59-1-17, as amended; and Rule 17(b) of the West Virginia Rules of Criminal Procedure, that due to the defendant's inability to pay the fees of said witness, that the costs and fees of the said witness be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed on behalf of the state.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

PETITION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 53-4-13, as amended, and Rule 17 of the West Virginia Rules of Criminal Procedure, to order the attendance of the following named incarcerated witness:

[*name of witness*]

[*location where incarcerated*]

and that said witness be transported by the State of West Virginia to appear before this Court on the [*date / time of trial*] to give testimony in this case.

The named witness is deemed to be necessary for an adequate defense of this case because of the following: [*insert reason for necessity of witnesses' testimony*].

The Defendant also requests, because [*he/she*] is indigent, that any and all costs and witness fees payable to [*witness name*] for such attendance be waived.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR DEPOSITION OF PROSPECTIVE WITNESS

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 15 of the West Virginia Rules of Criminal Procedure and Rule 34.01 of the Trial Court Rules, to order that the testimony of [*witness name*] be taken by deposition.

In support of said motion, the Defendant asserts that due to the following exceptional circumstances, it is in the interest of justice that the deposition of [*witness name*] be taken and preserved for use at trial: [*state exceptional circumstances mandating need for deposition*].

Counsel for the Defendant further asserts that, in accordance with Rule 34.01, that Counsel has requested a stipulated order from the attorney for the state, which request has been refused.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR APPOINTMENT OF INTERPRETER

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 28(b) of the West Virginia Rules of Criminal Procedure and West Virginia Code, § 57-5-7, as amended, to appoint an interpreter in this case.

In support of this motion, Counsel asserts that [*juror or witness name*] cannot readily understand or verbally communicate the English language because [*state reason that interpreter is needed*].

Counsel further requests that the costs and fees for such interpreter be paid by the state out of funds provided by law for such purposes.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

**MOTION FOR DISCLOSURE OF MENTAL HEALTH
RECORDS OF [*witness name*]**

Comes now the Defendant, [*defendant*], by [*his/her*] Counsel, [*counsel's name*], and moves the Court, pursuant to West Virginia Code, § 27-3-1(b)(3), as amended, and State v. Allman, 177 W.Va. 365, 352 S.E.2d 116 (1986), for an order permitting counsel for the Defendant to review and evaluate the mental health records of [*witness name*], a witness for the State of West Virginia in the trial of this case.

In support of this motion, Counsel asserts that [*witness name*] is a material witness for the State of West Virginia; that [*witness name*] has undergone counseling or treatment for [*specify nature of mental illness, disease or defect*] at [*specify name of facility or treating physician*]; that [*name of facility or physician*] currently maintains records detailing the present mental condition of [*witness name*]; that such records are relevant under the West Virginia Rules of Evidence, because such records are clearly probative of the issue of the witness' credibility; and that due to the nature of this illness, disease or defect, serious issues and questions exist as to the ability of the witness to testify truthfully and accurately at trial.

Therefore, because the issue of the credibility of the witness is relevant, the Defendant would request that the Court order disclosure of the mental records requested herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

III. POST-TRIAL MOTIONS

A. CHALLENGING THE VERDICT

Comments

1. Motion in Arrest of Judgment - “The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within ten days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the ten-day period.” R.Cr.P. 34. In essence, a motion for arrest of judgment may be filed when it appears on the face of an indictment that the indictment was found by the grand jury without legal authority; that the court had no jurisdiction of the offense; that more than one felony offense is charged; that the facts stated in the indictment do not constitute an offense; or that the indictment contains facts which would constitute a legal justification for the alleged crime. Cleckley, *Handbook on West Virginia Criminal Procedure*, Second Edition, pp. II-278, citing State v. Painter, 135 W.Va. 106, 63 S.E.2d 86 (1950).
2. Motion for Post-Verdict Judgment of Acquittal - Following a guilty verdict, or in the event of a jury’s inability to return a verdict, a defendant may move the court to enter a judgment of acquittal if, viewed in a light most favorable to the state, the evidence presented at trial was wholly insufficient to sustain a conviction. The test applied in determining whether to grant a motion for judgment of acquittal is whether a reasonable fact-finder must have a reasonable doubt as to an element of the offense. This motion should be filed within ten (10) days after the jury is discharged from the case. See R.Cr.P. 29(c).
3. Motion for a New Trial - A trial court may grant the defendant a new trial if, in the opinion of the court, a new trial is required in the interest of justice. The motion should be made within ten (10) days of the verdict or the discharge of the jury. The primary grounds usually asserted for a new trial include newly discovered evidence, jury misconduct, or the discovery of perjured testimony. A motion for a new trial can be addressed to both errors of law and sufficiency of evidence. See R.Cr.P. 33.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION IN ARREST OF JUDGMENT

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 34 of the West Virginia Rules of Criminal Procedure to arrest the judgment in the matter herein.

In support of this motion, the Defendant asserts that an arrest of judgment is appropriate because [*state grounds for arrest of judgment, including insufficiency of indictment, jurisdictional defects, or other pertinent grounds*].

Therefore, the Defendant requests that the Honorable Court grant the relief sought in this motion and arrest the judgment in the matter herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 29(c) of the West Virginia Rules of Criminal Procedure, to order the entry of a judgment of acquittal in the captioned matter.

In support of said motion, the Defendant asserts that on [*date*], the jury in the captioned matter [*either failed to return a verdict or returned a verdict of guilty*]. The Defendant asserts that the evidence in this case is insufficient to sustain a conviction for the offense[s] herein for the following reasons: [*state argument supporting claim of evidentiary insufficiency*].

Therefore, the Defendant requests that the Honorable Court grant the relief requested in this Motion and enter a judgment of acquittal in this matter.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR A NEW TRIAL

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure to grant a new trial to the Defendant herein.

In support of this motion, the Defendant asserts that a new trial in this matter is required in the interest of justice for the following specific reasons: [*state reasons that a new trial is required*].

Therefore, the Defendant requests that the Honorable Court grant the relief sought in this motion and grant the Defendant a new trial in this matter.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

B. MOTIONS REGARDING SENTENCING

Comments

1. Motion for Presentence Diagnosis and Classification - Following a felony conviction, and prior to sentencing, a defendant may move the sentencing court to direct that the defendant be sent to the Department of Corrections for the purpose of diagnostic and classification examinations. W.Va. Code, § 62-12-7a. The period of examination shall not exceed sixty (60) days. Following the completion of the examinations, a written report is prepared and is provided to all parties. The basic purpose of this procedure is to assist the court in arriving at an appropriate sentence for the defendant. Accordingly, this report should be read in conjunction with the presentence report prepared by a probation officer under W.Va. Code, § 62-12-7.
2. Motion for Sentencing as a Youthful Offender - Under W.Va. Code § 25-4-6, a defendant who has attained his/her eighteenth birthday but has not reached his/her twenty-third birthday by the time of sentencing, may petition the court for sentencing as a youthful offender. This option is available for any youthful offender charged with any felony offense, excepting those offenses punishable by life imprisonment or involving defendants who have previously been committed under this section. At the youthful offender center, the defendant will customarily receive educational assistance, vocational training, and such other examinations and testing as may be deemed appropriate by the center. Confinement in the youthful offender center shall be for a period of no less than six (6) months nor more than two (2) years. If a defendant successfully completes the youthful offender program, he/she is entitled to be placed on probation. If, however, the defendant proves to be unfit to remain at the center, or if he/she violates probation, the defendant is subject to the original sentence.
3. Motion for Probation - Eligibility for probation for a defendant is controlled by W.Va. Code § 62-12-1 to § 62-12-11, et. seq. Briefly, a defendant who has been convicted of any misdemeanor or felony offense may be eligible for probation. Among the exceptions to this general rule are persons convicted of offenses punishable by life imprisonment (§62-12-2(a)); crimes involving the use, presentment or brandishing of a firearm (§62-12-2); violent crimes against the elderly [§61-2-10a]; driving under the influence (§17C-5-2(p)); and third-offense shoplifting offenses (§61-3A-3(c)).
4. Petition for Probation [Magistrate Court Conviction] - Magistrates do not have the authority to suspend a sentence and place a defendant on probation. In re Mendez, 176 W.Va. 401, 344 S.E.2d 396 (1986). Therefore, a defendant seeking probation following a conviction in magistrate court must file a petition with the circuit court. W.Va. Code, § 62-12-4. The circuit court may order that a presentence report be prepared prior to determining the petitioner's eligibility and fitness for probation.

5. Motion for Home Incarceration - The eligibility of a defendant for home incarceration is guided by W.Va. Code, § 62-11B-1, et. seq., which states that “any adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary...” may be considered an “offender” for the purposes of the Home Incarceration Act. Home incarceration may be granted by either a circuit court or, under §62-11B-6(c), by a magistrate court. Defendants placed on home confinement are responsible for their own costs [medical, food, rent, etc.], in addition to any costs that may be imposed as a result of home incarceration. A person serving a sentence on home incarceration is not entitled to deductions for good conduct. §62-11B-4(c).
6. Motion for Work Release - “When a defendant is sentenced or committed for a term of one year or less by a court of record having criminal jurisdiction, such court may in its order grant to such defendant the privilege of leaving the jail during necessary and reasonable hours ... to work at his employment.” W.Va. Code § 62-11A-1. This statute also permits the court to release the defendant for other purposes, including seeking employment, attending school, obtaining medical treatment or for any other purpose approved by the court. Work release may be permitted in conjunction with home incarceration. W.Va. Code §62-11B-5. A defendant who is permitted work release is eligible for deductions for good conduct.
7. Motion for Reconsideration of Sentence - Following sentencing, a defendant may petition for either correction of an illegal sentence (R.Cr.P. 35(a)), or for reduction or reconsideration of the sentence. This motion must be made within one hundred twenty (120) days after (1) a sentence is imposed, (2) probation is revoked, or (3) the entry of a mandate from the Supreme Court of Appeals affirming a conviction or probation revocation, or rejecting a petition for appeal from these proceedings. R.Cr.P. 35(b).
8. Motion for Stay of Execution of Sentence - Under R.Cr.P. 38 and W.Va. Code, §62-7-1, et seq., a sentence of imprisonment, a sentence to pay a fine, or an order placing a defendant on probation may be stayed pending appeal. If an appeal is taken from a sentence of imprisonment, the court is under a mandatory duty to stay the execution of the sentence pending the outcome of the appeal. Depending on the nature of the conviction, post-conviction bail may be available under W.Va. Code, §62-1C-1. If the defendant remains in custody during this time, he/she is entitled to remain “near the place of trial for a period reasonably necessary to permit the defendant to assist in the preparation” of the appeal. Upon an appeal of a sentence of a fine, the court may require the defendant to post a bond in the amount of the fine. R.Cr.P. 38(c).

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR PRESENTENCE DIAGNOSIS AND CLASSIFICATION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-12-7a, as amended, to order that the Defendant be delivered to the custody of the commissioner of corrections for the purpose of undergoing a presentence diagnosis and classification.

In support of this motion, the Defendant asserts that presentence diagnostic and classification examinations would be beneficial to the court in determining the appropriate sentence in this matter.

Therefore, the Defendant requests that the Honorable Court grant the relief requested in this motion and order that the Defendant be transported to the custody of the commissioner of corrections for the appropriate presentence and diagnostic evaluations.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION FOR SENTENCING AS A YOUTHFUL OFFENDER

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 25-4-6, as amended, to suspend the imposition of sentence and commit the Defendant to the custody of the commissioner of corrections for assignment to a center for youthful offenders.

In support of this motion, the Defendant asserts that [*he/she*] is eligible for assignment to a center for youthful offenders in that the Defendant has attained [*his/her*] eighteenth birthday, but has not yet attained [*his/her*] twenty-third birthday; that the Defendant has not previously been committed under this section; and that the offense herein is not punishable by life imprisonment.

Therefore, the Defendant requests that the Honorable Court grant the relief requested in this motion and sentence the Defendant as a youthful offender.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION FOR PROBATION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-12-1, et. seq., as amended, and Rule 32[g] of the West Virginia Rules of Criminal Procedure, to suspend the sentence imposed herein and place the Defendant on probation under such terms and conditions as the court may deem appropriate.

In support of this motion, the Defendant asserts that [*he/she*] is eligible for probation under § 62-12-2 and is a good and proper candidate for probation for the following reasons: [*list all positive factors supporting motion for probation*].

Therefore, the Defendant requests that the Honorable Court grant the relief requested in this motion and place the defendant on probation.

[*defendant*],
By Counsel

[*counsel name and bar #*]

[*address*]

Counsel For Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

PETITION FOR PROBATION [MAGISTRATE COURT]

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-12-4, as amended, and In re Mendez, 176 W.Va. 401, 344 S.E.2d 396 [1986], to suspend the sentence imposed in the Magistrate Court of [*county*] County and place the Defendant on probation under such terms and conditions as the court may deem appropriate.

In support of this petition, the Defendant asserts the following: [*list date of magistrate court conviction, specific offense and sentence imposed, eligibility for probation under § 62-12-2, and all other positive factors supporting motion for probation*].

Therefore, the Defendant requests that the Honorable Court grant the relief requested in this petition and place the Defendant on probation.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR HOME INCARCERATION

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-11B-1, et. seq., as amended, to permit the Defendant to serve [*his/her*] sentence in this matter on home incarceration.

In support of this motion, the Defendant asserts that [*he/she*] was convicted of [*state offense*] on [*date*]; that under the provisions of the West Virginia Code, the Defendant is eligible for home incarceration for this offense; and that the Defendant would be a fit and proper candidate for home incarceration.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION FOR WORK RELEASE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-11A-1, et. seq., grant to the Defendant the privilege of leaving [*jail or home incarceration*] during all necessary and reasonable hours to work at [*his/her*] employment.

In support of this motion, the Defendant asserts that [*he/she*] has been sentenced to a term of confinement of [*length of jail or home incarceration sentence*] for the offense of [*nature of offense*]; that [*he/she*] is gainfully employed by [*employer and address of employer*]; and that it would be in the interest of justice to permit the Defendant to continue such employment during [*his/her*] period of incarceration.

Therefore, the Defendant requests that the Honorable Court grant the relief requested in this motion and permit the Defendant to work at [*his/her*] regular employment during [*his/her*] term of confinement.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

MOTION FOR RECONSIDERATION OF SENTENCE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure, to reconsider the sentence previously imposed upon the Defendant in this matter.

In support of this motion, the Defendant asserts the following: [*list date and nature of previous sentence; that motion is being filed within proper time limits; reasons for reconsideration of sentence; relief requested, i.e., reduced term or probation; and any and all other favorable factors justifying a reduction of sentence*].

Therefore, the Defendant requests that the Honorable Court grant the relief requested in this motion and reduce the sentence previously imposed as requested herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*County*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION FOR STAY OF EXECUTION OF SENTENCE

On this date came the Defendant, [*name*], by [*his/her*] Counsel, [*counsel's name*], and moved the Honorable Court, pursuant to West Virginia Code, § 62-7-1, et. seq., as amended, and Rule 38 of the West Virginia Rules of Criminal Procedure, to stay the execution of the sentence imposed in this case pending further appeal of this matter.

In support of this motion, the Defendant asserts that the Defendant was sentenced on [*sentencing date*] to [*specify sentence*], and that the Defendant intends to appeal the conviction and/or sentence in this matter.

[*if defendant was sentenced to a term of imprisonment and remains incarcerated, it is advisable to request that defendant be housed near the place of trial while the appeal is being prepared*].

Therefore, the Defendant requests that the Honorable Court grant the stay requested in the motion herein.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IV. POST-CONVICTION RELIEF

A. APPEALS

Comments

1. Notice of Intent to Appeal - W.Va. Code § 58-5-4, along with R.Cr.P. 37(a) and R.A.P. 3(b), indicate that the first step in the appeals process is the filing of a Notice of Intent to Appeal. This Notice must be filed within 30 days of the entry of the judgment or order. The Notice must state the identity of the party taking the petition for appeal; must indicate the specific judgment, order or portion therefrom that is being appealed from; shall indicate the court in which the petition is taken; shall designate by itemization such pleadings, orders or other exhibits to be sent with the appeal; and must specify the grounds for the appeal. This listing is not exclusive, and counsel may assign additional grounds for appeal in the petition.

The time limits contained in the statutes and the rules regarding appeals are considered jurisdictional, and a defendant's failure to follow these limits may foreclose an appeal and would, if the delay was caused by counsel, lead to an allegation of ineffective assistance of counsel. See State v. Rogers, 189 W.Va. 730, 434 S.E.2d 402 (1993); State v. Legg, 151 W.Va. 401, 151 S.E.2d 215 (1966).

2. Appellate Transcript Request Form - Included here is a copy of the Appellate Transcript Request Form as indicated in Appendix B of the Rules of Appellate Procedure. These forms are available from the circuit clerk's office or from the Clerk of the Supreme Court of Appeals. It is important to designate any and all transcripts which may be necessary for the appeal, including pretrial hearings, suppression hearings, and the precise rulings of the court. As with the Notice of Intent to Appeal, the Appellate Transcript Request must be completed and mailed within 30 days from entry of the judgment being appealed.
3. Motion to Extend Period for Appeal - The Circuit Court has the discretionary power to extend the four-month period for appeal. R.A.P. 3(a). Under this provision, the Court can extend the period for appeal "for good cause shown", for a period not to exceed two (2) months. This motion, and the order granting such motion, must be filed prior to the expiration of the four-month appeal period. This motion is generally filed when the transcripts have not been completed by the end of the appeal period, or will be received so late as to effectively prohibit their effective use in the presentation of the appeal.
4. Motion to File Petition for Appeal Outside Time Limits - Filed with the Supreme Court of Appeals, this Motion seeks leave of the Court to file the petition outside of the designated appeal period. This motion is generally filed when the appeal period has passed or is about to pass without further permission from the Circuit Court for an extension of the appeal period. The petitioner must establish "good cause" in order to have the appeal period enlarged by the Court.

5. Docketing Statement - Under R.A.P. 4(a), a docketing statement must be filed with the petition for appeal and attached to the face of the petition and each of the copies. The docketing statement is included in the Rules of Appellate Procedure as Appendix “A”.
6. Motion to Withdraw as Counsel Due to Lack of Grounds for Appeal - Occasionally, an attorney may be assigned the task of representing a petitioner on an appeal, only to find after investigation that there are no meritorious grounds for the appeal. Counsel should not, obviously, file an appeal alleging frivolous grounds simply because the client demands action. Counsel may not, however, summarily withdraw from such representation. In these circumstances, counsel should file this motion to obtain the permission of the court to withdraw from further representation in the matter. See Anders v. California, 386 U.S. 738 (1967); Rhodes v. Leverette, 160 W.Va. 781, 239 S.E.2d 136 (1977); Turner v. Hayes, 162 W.Va. 33, 245 S.E.2d 629 (1978).
7. Brief in Support of Motion to Withdraw as Counsel Due to Lack of Grounds for Appeal - The Courts in Anders v. California and Turner v. Hayes have noted the necessity, when counsel is moving to withdraw from a case because of a lack of meritorious appeal issues, of providing the Court with a brief citing counsel’s reasons for moving for withdrawal. In this brief, counsel must state any and all facts pertinent to the case and, most importantly, must list any and all potential appeal issues, with supporting law, and the reasons that counsel deems these issues to be frivolous.
8. Motion for Leave to Exceed Petition Page Limits - R.A.P. 3(c) states that a petition for appeal shall not exceed fifty (50) pages, including any addendum (i.e., any exhibits, etc.) but excluding the docketing statement. Counsel should endeavor to meet this requirement, but counsel should request leave to exceed this limit if a full and complete understanding of the appeal is not possible within the framework of the page limits. [For example: a client is appealing based upon the failure of the state to provide certain discovery materials. It may be necessary to provide copies of these materials with the petition so that the Court can fully review the issue].
9. Petition for Appeal - R.A.P. 3(c) sets forth the requirements for a petition for appeal. The petition must include (1) the kind of proceeding and nature of the ruling in the lower court; (2) a statement of the facts of the case; (3) the assignments of error relied upon on appeal and the manner in which they were decided in the lower court; and (4) the points and authorities relied upon, a discussion of the law, and the relief requested. Under R.A.P. 4(a), counsel must file an original and nine (9) copies of the petition in the office of the clerk of the circuit court where the judgment, order or decree being appealed was entered. The petition should be served as provided in R.A.P. 15. [Note: under R.A.P. 4A, a petition for appeal can be filed without the transcripts taken in the lower court. The form of this petition does not materially differ from the typical petition form, but the time limit for filing such a petition is

limited to sixty (60) days. Filing under this method also entails different requirements for service of process, and counsel is also required to provide a certificate that the facts as alleged are faithfully represented and are accurately presented to the best of counsel's ability].

10. Designation of Record for Appeal - As part of the appeal process, counsel must, pursuant to R.A.P. 4(c), designate by itemization any and all pleadings, orders, or other exhibits that counsel wishes to accompany the petition to the Supreme Court of Appeals. If necessary, counsel may subsequently file with the Circuit Court a designation of such additional parts of the record as counsel considers material to the issues presented upon appeal. R.A.P., 8(a)(1). If counsel considers the record to be adequate, counsel must notify the clerk of the Circuit Court that he/she considers the record as provided to be adequate. R.A.P., 8(a)(1). Further, once the petitioner has received the respondent's designation of record, the petitioner may file a designation of such additional parts of the record as are considered to be necessary in view of those items designated by the appellee [*see attached*].
11. Petitioner's Brief and Reply Brief - "Within thirty days of the date of the notice of the filing of the appellate record, the appellant shall file an original and nine copies of his brief with the Clerk of the Supreme Court. One copy thereof shall be served by the appellant upon each party to the appeal." R.A.P., 10(a). The appellant's brief shall follow the same form as the petition for appeal, R.A.P., 10(d), and shall otherwise comply with R.A.P. 28 regarding form and filing. The original and nine copies of the reply brief shall be filed within fifteen days from the date of receipt of the appellee's brief. R.A.P., 10(c).

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

NOTICE OF INTENT TO APPEAL

Comes now the Defendant, [*name*], by and through [*his/her*] Counsel, [*counsel name*],
and pursuant to Rule 37 of the West Virginia Rules of Criminal Procedure and Rule 3(b) of the West
Virginia Rules of Appellate Procedure, does hereby provide notice of [*his/her*] intent to appeal the
judgment and conviction entered in this case on [*date of entry of judgment or order*].

The Defendant hereby sets forth the following grounds for appeal:

[*enumerate any and all grounds for appeal and state that appeal may include any other
grounds that may become evident upon receipt of the transcript of the case.*].

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

APPENDIX
GUIDELINES FOR PREPARATION OF APPELLATE
TRANSCRIPTS IN WV COURTS

I. INTRODUCTION

A. Purpose

These guidelines set forth in detail the following:

1. Duties of the Circuit Clerk's office, the petitioner and the respondent in requesting appellate transcripts;
2. Responsibilities of the court reporter for preparing and timely filing appellate transcripts;
3. Duties of the Clerk of the Supreme Court of Appeals in monitoring the timeliness of the filing of appellate transcripts;
4. Procedures for court reporters to follow in requesting extensions of time and waivers of fee sanctions;
5. Criteria to be used by the Supreme Court of Appeals in acting on requests for extensions and waivers; and
6. Common problems that have been encountered by court reporters and the Supreme Court of Appeals in the requesting, preparation and filing of appellate transcripts.

B. Relation to Other Court Rules

These guidelines shall be construed in a manner consistent with Rule 73(b) of the West Virginia Rules of Civil Procedure, Rule 37(b) of the West Virginia Rules of Criminal Procedure and the West Virginia Rules of Appellate Procedure.

C. Effective Date

These guidelines will take effect on January 1, 1996, and will apply to all cases subject to the West Virginia Rules of Civil Procedure and the West Virginia Rules of Criminal Procedure in which a transcript is requested after that date for purposes of appeal.

D. Definitions

For purposes of these guidelines, references to the petitioner or the respondent will refer to counsel for the petitioner or the respondent unless a party is proceeding pro se, in which case all duties and responsibilities are those of the petitioner or the respondent individually. References to transcripts will mean transcripts requested for purposes of appeal only.

II. REQUESTING TRANSCRIPTS

A. Duties of Circuit Clerk's Office

1. The Circuit Clerk will post copies of these guidelines in a conspicuous place in the clerk's office and will provide copies thereof to substitute or contract court reporters and to any other person who requests them.

2. The Circuit Clerk will maintain in his or her office a supply of the Appellate Transcript Request forms promulgated by the Supreme Court of Appeals and shall provide such forms to any person who requests a copy thereof.

3. The Circuit Clerk will retain in his or her office a copy of the completed Appellate Transcript Request form filed by the petitioner.

B. Duties of the Petitioner

1. Within thirty days after entry of the judgment or order from which the appeal is being taken, the petitioner shall request from the court reporter such transcript of the proceedings as he or she deems necessary using the Appellate Transcript Request form approved by the Supreme Court of Appeals.

2. Before a transcript can be requested, the petitioner must obtain from the court reporter an estimate of the length of the transcript and make appropriate financial arrangements with the court reporter (1) by immediate payment in full or by another payment arrangement acceptable to the court reporter, (2) by filing, in appropriate cases, an affidavit of indigency with the circuit clerk's office. Payment or acknowledgment of financial arrangements satisfactory to the court reporter must accompany the court reporter's copy of the Transcript Request.

3. To request a transcript, the petitioner shall complete the Appellate Transcript Request form furnished by the Circuit Clerk's office and distribute the copies as follows:

Copy 1--to the Clerk of the Supreme Court of Appeals

Copy 2--to the respondent

Copy 3--to the Circuit Clerk

Copy 4--to the court reporter

Copy 5--retain by petitioner

A separate Appellate Transcript Request form must be prepared for each court reporter from whom a transcript is requested.

4. The petitioner's failure to request a transcript within the time specified, to make satisfactory financial arrangements with the court reporter, or to specify in adequate detail those proceedings to be transcribed may result in denial of motions for extension of the appeal period or subject the appeal to dismissal by the Supreme Court of Appeals for want of prosecution.

5. When supplemental transcripts are requested, the petitioner must complete another Appellate Transcript Request form, make satisfactory financial arrangements with the court reporter, and distribute copies to the same persons to whom the original Transcript Request was sent.

6. The court reporter may defer payment at the time transcript is requested, in which case the petitioner must make full payment upon receipt of the court reporter's invoice. If payment is not received by the court reporter within a reasonable period of time, the Supreme Court of Appeals may deny motions for extension of the appeal period or dismiss the appeal for want of prosecution.

7. When a petitioner has requested a transcript, he or she is obligated to pay the court reporter for it. If the appeal is dismissed voluntarily, the petitioner is nonetheless responsible to the court reporter for the cost of transcript prepared prior to the court reporter's receipt of notification from the petitioner of the appeal's dismissal.

C. Duties of the Respondent

1. If the respondent deems a transcript of other parts of the proceedings not designated by the petitioner to be necessary, he or she may ask the court reporter to prepare a transcript of such additional parts by submitting a Appellate Transcript Request form upon the same terms and conditions as are applicable to the petitioner's request for a transcript.

2. If the respondent wishes to obtain a copy of a transcript which has been requested by the petitioner, he or she may do so by asking the court reporter. Satisfactory financial arrangements must be completed with the court reporter before obtaining the copy. It is not the petitioner's responsibility to request and pay for a copy of the transcript for respondent.

D. Duties of the Court Reporter

1. Upon receipt of the Appellate Transcript Request form, the court reporter shall prepare the required transcript within 45 days.

2. The court reporter shall promptly notify the Clerk of the Supreme Court of Appeals of any problem with the Transcript Request, such as the petitioner's failure to make appropriate financial arrangements or inadequate identification of the transcript requested. **Failure to notify the Clerk of the Supreme Court of Appeals of such problems promptly after receipt of the Transcript Request may result in sanctions against the court reporter.**

3. When the transcript has been completed, the court reporter will file the original transcript in the Circuit Clerk's office and mail a copy of the court reporter's certification, setting forth the date the transcript was filed, to the Supreme Court of Appeals.

4. Unless an extension is granted by the Clerk of the Supreme Court of Appeals, requests by a petitioner that a court reporter suspend or delay preparation of a transcript will have no effect on the date the transcript is due, or on the petitioner's obligation to pay for it when it is prepared. The only exception is when a motion for voluntary dismissal of the appeal has been granted; in that instance the petitioner is responsible for paying only for that portion of the transcript completed prior to the court reporter's receipt of notification from the petitioner of the appeal's dismissal.

E. Duties of Supreme Court of Appeals

1. Failure to submit the Appellate Transcript Request form on time may result in denial of motions for extension of the appeal period or subject the appeal to dismissal by the Supreme Court of Appeals for want of prosecution.

2. When the Clerk of the Supreme Court of Appeals receives the Appellate Transcript Request form, it will be reviewed for any obvious defects [e.g., multiple court reporters on one form, or incompleteness as far as nature of proceedings requested or certification of satisfaction of financial requirements].

III. TIME LIMITS FOR FILING TRANSCRIPTS – FEE REDUCTION SANCTIONS

A. Requests for Extensions of Time

All court reporters' requests for extensions of time for the filing of appellate transcripts shall be submitted to the Clerk of the Supreme Court of Appeals. A request for a 15-day extension of the initial 45-day period may be made by telephone, but all subsequent requests for extensions of time must be in writing, on the designated form. A request for an extension of time will automatically constitute a corresponding request for a waiver of any applicable fee reduction sanction. Requests for extensions must be mailed **10 days in advance of the deadline** from which relief is sought, unless unforeseen circumstances make later requests necessary, in which case the reasons will be set out by the court reporter in the request. When requesting an extension, the information furnished should be very specific. Failure to submit complete information will delay action on the request and lead to additional paperwork for the court reporter. After reviewing the request for extension, the Supreme Court of Appeals will issue an order granting, granting in part, or denying the request, which will set forth the resulting time frames for purposes of fee sanction imposition. Counsel and the Circuit Clerk will also receive copies of this order.

B. Grounds for Extensions of Time

1. Excessive Burden of Transcript, Considering Length and Complexity of the Proceedings Requested Within a Short Period of Time.

A court reporter may apply for relief from applicable fee sanctions on grounds of excessive transcript load and ask that the Supreme Court of Appeals assign relative priority to be given to competing appellate transcript requests. The existence of outstanding overdue transcripts may or may not be grounds for extending the time for subsequently requested transcripts. The court reporter may include transcript obligations for the circuit court as well as those requested for appellate purposes. However, the requests must be "firm requests". A "firm request" for an appellate transcript is one for which the Supreme Court of Appeals has received a Appellate Transcript Request form from the petitioner. For a Circuit Court transcript it is a request communicated by a judge or a party; it cannot be a court reporter's speculation that a request will be forthcoming.

2. Vacation.

A court reporter can plan to take reasonable vacations, as authorized by the Circuit Court, and obtain extensions of deadlines that would fall within those periods or become impossible to meet in light of them.

3. Unavoidable, Excessive Time Required for Attendance in Court.

Reasonable extensions of time may be given when a court reporter's courtroom obligations, including official travel required to reach the courtroom, prevent him or her from meeting transcript obligations.

4. Incapacitation or Serious Illness.

A court reporter may certify to the Clerk of the Supreme Court of Appeals that he or she has become temporarily incapacitated or seriously ill, and obtain reasonable relief from pending deadlines. No extension of time will be granted for common colds or other ailments that would not prevent attendance in court.

5. Unforeseen Emergencies.

Court reporters may seek extensions for any other good cause which makes the completion of a transcript within the allotted time impossible.

IV. SANCTIONS

A. Fee Reduction Sanctions

An official court reporter will be required to deduct from his or her charges for a completed transcript not timely filed with the circuit clerk the amount specified in the following table:

NATURE OF CASE	TRANSCRIPT DUE	10% FEE REDUCTION	20% FEE REDUCTION FREELANCE REVOCATION	20% FEE REDUCTION PAYCHECK WITHHELD
Criminal appeals and civil appeals.	Within 45 days	If filed after 45th day*	If filed after 60th day*	If filed after 90th day*
Expedited transcripts [e.g., bail petitions, etc.]	As ordered by the Supreme Court of Appeals	If due date missed	If due date missed by more than 30 days	If due date missed by more than 60 days

*If an extension of time has been granted by the Clerk of the Supreme Court of Appeals, the sanction will not be applied until the expiration of such extension.

V. MONITORING OF TRANSCRIPT FILING

The Clerk of the Supreme Court of Appeals will monitor the filing of all appellate transcripts and the fees charged by court reporters when a transcript is filed untimely. **The fee sanction mechanism is automatic and will take effect without the filing of a sanction order by the Supreme Court of Appeals.**

The Supreme Court of Appeals will take no action if the transcript is filed on time or, if not filed on time, where the appropriate fee reduction has been taken as shown by the copy of the certification that the court reporter submitted to the Supreme Court of Appeals when the transcript was filed. If a fee reduction was applicable and was not taken by the court reporter, the Supreme Court of Appeals will send a letter to the court reporter setting forth the fee reduction that should have been taken. Copies of this letter will be sent to counsel and the judge to whom the court reporter reports or the Chief Judge of the Circuit. If the certification is not submitted within a reasonable period after the filing of the transcript, the court reporter will be requested to submit a copy of his or her invoice.

The Supreme Court of Appeals will also send a letter to the Chief Judge when a transcript is sixty days overdue. The letter will identify the particular transcript involved and the date of the request. Copies of the letter will be sent to the judge [if any] to whom the court reporter reports, the Circuit Clerk, and the court reporter.

VI. COMMON PROBLEMS

A. Supplemental Transcripts

Supplemental transcripts requested after the original transcript has been filed and a briefing schedule established by the Supreme Court of Appeals should be expedited. Counsel is under an obligation to notify the Clerk of the Supreme Court of Appeals that a supplemental transcript has been requested.

B. Expedited Proceedings

When a transcript is requested for an expedited proceeding, the due date for filing the transcript is established by the Supreme Court of Appeals. If an expedited transcript is requested and prepared within seven days after receipt or notification of the request, the court reporter may charge higher rates for expedited transcripts, subject to review by the Administrative Director. Only those portions of the transcript pertinent to the appeal must be prepared on an expedited basis. The court reporter will be notified by the Supreme Court of Appeals when a motion to expedite has been granted.

In bail appeals, only the portion of the transcript dealing with the bail issue should be requested on a rush basis. Even though there may be other portions of the transcript that the petitioner has requested, the portion dealing with the bail issue should be prepared first. In expedited proceedings, a twenty percent fee sanction from the regular transcript rate will be imposed if the due date is missed. At the same time, a letter will be sent to the chief judge of the Circuit Court, advising of the delinquency and warning of further sanctions if the transcript is not filed immediately. IF THE COURT REPORTER ANTICIPATES A PROBLEM WITH PROMPT PREPARATION OF AN EXPEDITED TRANSCRIPT, THE SUPREME COURT OF APPEALS SHOULD BE NOTIFIED IMMEDIATELY.

C. Payment for Transcript

The Supreme Court of Appeals approves of court reporters demanding a substantial deposit or full payment in advance for preparation of a transcript. In those instances where a court reporter does not demand full payment in advance, and upon transcript completion has not been paid fully by the petitioner, the following procedures should be followed:

1. Timely file the court copy of the transcript with the Circuit Clerk's office.
2. Contact the Clerk of the Supreme Court of Appeals immediately. A letter will be sent to the petitioner stating that if full payment is not made to the court reporter within fifteen days of the date of the letter, the appeal will be subject to dismissal for failure to prosecute. Fee reduction sanctions will be applicable if the court copy of the transcript is not timely filed. Problems with payment for the transcript after its completion will have no effect on the established due date.

D. Substitute Court Reporters

When an official court reporter hires a substitute, the official court reporter still retains responsibility for the timely filing of the transcript. All provisions applicable to an official court reporter will be applicable to the substitute. If there is a problem with the filing of a transcript, the official court reporter will be notified as well as the substitute court reporter. All correspondence and orders by the Supreme Court of Appeals will be sent to both court reporters. The substitute can request extensions of time and waivers of applicable fee sanctions from the Supreme Court of Appeals. However, all guidelines applicable to the official court reporter will be applicable to the substitute court reporter and the proper procedures for requesting extensions must be followed.

WV Supreme Court of Appeals

APPELLATE TRANSCRIPT REQUEST
READ INSTRUCTIONS ON BACK OF PAGE BEFORE COMPLETING

Case Style _____
Civil/Criminal Action No. _____ County _____
Date of Judgment or Order from which Appeal is Sought _____
Name of Court Reporter/ERO _____
Address of Court Reporter _____

TO BE COMPLETED BY PARTY REQUESTING TRANSCRIPT

Do Not Submit Form until Financial Arrangements Have Been Made with the Court Reporter. Failure to Mail this Form to Appropriate Persons Within Thirty [30] Days of the Judgment Being Appealed May Result in Denial of Motions for Extension of the Appeal Period or Dismissal of the Appeal for Want of Prosecution. A Separate Transcript Request must Be Completed for Each Court Reporter from Whom a Transcript Is Requested.

A. This constitutes a request for a transcript of the following proceedings [check appropriate box(es)].

PROCEEDING

HEARING DATE[S]

<input type="checkbox"/> Voir Dire	_____
<input type="checkbox"/> Opening Statement [Plaintiff]	_____

<input type="checkbox"/> Opening Statement [Defendant]	_____
<input type="checkbox"/> Closing Argument [Plaintiff]	_____
<input type="checkbox"/> Closing Argument [Defendant]	_____
<input type="checkbox"/> Opinion of Court	_____
<input type="checkbox"/> Jury Instructions	_____
<input type="checkbox"/> Sentencing	_____
<input type="checkbox"/> Bail Hearing	_____
<input type="checkbox"/> Pre-Trial Proceedings [specify]	_____
_____	_____
<input type="checkbox"/> Testimony [specify]	_____
_____	_____
<input type="checkbox"/> Other [specify]	_____
_____	_____
TOTAL ESTIMATED PAGES	_____

NOTE: Failure to Specify in Adequate Detail Those Proceedings to Be Transcribed Is Grounds for Denial of Extensions of the Appeal Period or Dismissal of an Appeal.

B. I certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made.

☐ Private funds. [Deposit of \$ _____ enclosed with court reporter's copy. Check No. _____].
☐ Petitioner has filed an affidavit of indigency with the circuit clerk's office [copy attached].
☐ Advance payment waived by court reporter.
☐ Other _____.

Signature _____ Typed Name _____
Address _____
Telephone No. _____ Date mailed to court reporter _____

White - to W.Va. Supreme Court of Appeals, State Capitol Building, Charleston, WV 25305
Green - to respondent; *Canary* - to the circuit clerk; *Pink* - to court reporter; *Goldenrod* - to be retained by petitioner

INSTRUCTIONS TO COURT REPORTER

It is the petitioner's responsibility to contact the court reporter and make satisfactory financial arrangements before completing the Appellate Transcript Request form. Petitioner must mail the form to the court reporter and all other parties within thirty days after the judgment being appealed.

Written requests for extension of time and waiver of applicable fee reduction sanctions must be addressed to the Clerk of the Supreme Court of Appeals for any transcript which cannot be completed within the required time. Information furnished in support of the request must be very specific and follow the procedures set forth in the Guidelines for Preparation of Appellate Transcripts [copies of these Guidelines are available in the circuit clerk's office]. THE CLERK OF THE SUPREME COURT OF APPEALS WILL GRANT WAIVERS SPARINGLY AND ONLY WHEN THERE ARE EXTENUATING CIRCUMSTANCES.

Unless a written motion is filed by the petitioner with the Clerk of the Supreme Court of Appeals and an extension or waiver granted by the Supreme Court of Appeals, requests by a petitioner that a court reporter suspend or delay preparation of a transcript that has been requested will have no effect on the date the transcript is due, or on the petitioner's obligation to pay for it when it is prepared.

TO INSURE THAT ALL COPIES ARE LEGIBLE, THIS FORM SHOULD BE TYPED. IF IT IS IMPOSSIBLE TO TYPE, USE A BALLPOINT PEN, PRESS FIRMLY, AND CHECK ALL COPIES AFTER COMPLETION

INSTRUCTIONS TO PETITIONER FOR REQUESTING APPELLATE TRANSCRIPTS

You have thirty days after judgment to complete and mail all copies of this form. DO NOT SUBMIT THIS FORM UNTIL YOU HAVE MADE SATISFACTORY FINANCIAL ARRANGEMENTS WITH THE COURT REPORTER.

1. Contact each court reporter involved in reporting the proceedings, obtain an estimate of total pages, and make arrangements for payment. If you are unsure of the court reporter[s] involved, contact the circuit clerk's office for that information. A SEPARATE APPELLATE TRANSCRIPT REQUEST FORM MUST BE PREPARED FOR EACH COURT REPORTER FROM WHOM A TRANSCRIPT IS REQUESTED. IF NECESSARY, CONTACT THE CIRCUIT CLERK FOR ADDITIONAL BLANK FORMS.

2. If payment is waived by the court reporter until completion of the transcript, the petitioner must remit full payment within a reasonable period of time upon receipt of the court reporter's invoice.

3. Complete the Appellate Transcript Request form in its entirety.

4. Distribute the copies of the Appellate Transcript Request form as follows:

Copy 1--to Supreme Court of Appeals
Copy 2--to respondent
Copy 3--to the circuit clerk
Copy 4--to court reporter
Copy 5--to be retained by petitioner

THE APPELLATE TRANSCRIPT REQUEST FORM MUST BE COMPLETED AND MAILED TO THE PROPER DESIGNEES WITHIN THIRTY DAYS AFTER ENTRY OF THE JUDGMENT BEING APPEALED.

Failure to make satisfactory arrangements for transcript production, including necessary financial arrangements, within thirty days after entry of judgment, may result in denial of motions for extensions of the appeal period or dismissal of the appeal by the Supreme Court of Appeals for failure to prosecute.

If you have further questions, contact the Clerk of the Supreme Court of Appeals ((304) 558-2601)

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

MOTION TO EXTEND PERIOD FOR APPEAL

Comes now the Defendant, [*name*], by and through [*his/her*] Counsel, [*counsel name*], and pursuant to West Virginia Code, § 58-5-4, as amended, and Rule 37(b)(3) of the West Virginia Rules of Criminal Procedure and Rule 3(a) of the West Virginia Rules of Appellate Procedure, and moves the Court to extend the period for appeal in this matter.

In support of this motion, Counsel asserts that the order of judgment/conviction was entered on [*date*]; that the period of appeal of four (4) months has not yet expired; that good cause for an extension of this appeal period exists because [*state reasons for extension of appeal period, i.e., transcripts not yet provided, complexity and breadth of appeal, etc.*].

Therefore, the Defendant requests that the Court extend the appeal period in this matter for a period not to exceed two (2) months.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent,

VS.

SUPREME COURT # _____
[*county and case #*]

[*client's name*],
Petitioner.

MOTION TO FILE PETITION FOR APPEAL OUTSIDE TIME LIMITS

COMES NOW the Petitioner, [*defendant's name*], by and through [*his/her*] Counsel,
[*counsel name*], and pursuant to Rule 16(b) and Rule 17 of the West Virginia Rules of
Appellate Procedure does hereby move the Honorable Court to permit [*him/her*] to file the
Petition for Appeal outside the time limits prescribed in Rule 3(a) of the West Virginia Rules of
Appellate Procedure for such filings. In support of this Motion, Counsel for the Petitioner asserts
the following:

[*cite all grounds establishing "good cause" as required under R.A.P. 16(b)*].

THEREFORE, the Petitioner prays that the Honorable Court grant the relief requested in
the Motion herein and permit the Petitioner to file the Petition for Appeal outside the prescribed
time limits.

[*petitioner/defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Petitioner

Supreme Court of Appeals of West Virginia

Docketing Statement

INSTRUCTIONS:

1. A docketing statement must be filed for every civil and criminal case appealed to the Supreme Court of Appeals. A docketing statement is not required for petitions for appeal from administrative tribunals, petitions for certified question review, petitions for post-conviction bail, or petitions for original jurisdiction relief.
2. The docketing statement must be attached to the original and each copy of the petition for appeal, including those served upon opposing counsel or parties unrepresented by counsel. The docketing statement must be in the form approved by the Supreme Court of Appeals or in a substantially similar form. Abbreviations may be used in the case style portion of the docketing statement.
3. The attorney filing the petition for appeal is responsible for filing the docketing statement, even if different counsel will handle the appeal.
4. Only one docketing statement shall be filed for each petition for appeal. In the case of multiple petitioners joining in one petition for appeal, the parties should confer and decide who will file the docketing statement.
5. The nature of proceedings and relief sought should be stated summarily. The docketing statement is not a brief and should not contain argument or motions. The issues should be expressed in terms and circumstances of the case but without unnecessary detail. Conclusory statements such as “the judgment of the trial court is not supported by the law or facts ” are unacceptable.
6. Counsel or parties unrepresented by counsel should make every effort to include in the docketing statement all of the issues to be presented to the Supreme Court of Appeals. Failure to include all issues or the manner of presenting issues in the docketing statement, however, will not affect the jurisdiction of the Supreme Court of Appeals to consider the issues as presented in the petition.
7. If a respondent concludes that the docketing statement is inaccurate or incomplete, such inaccuracies or omissions should be addressed in the response to the petition for appeal.

Supreme Court of Appeals of West Virginia

Docketing Statement

Style of Case [use style from final order]

Type of Action:

Civil ☐

Criminal ☐

Petitioner[s]:

Plaintiff[s] ☐

Defendant[s] ☐

Circuit Judge:

County:

Circuit

Number:

TIMELINESS OF APPEAL

Date of entry of judgment or order appealed from:

Filing date of any post-judgment motion filed by any party pursuant to R. Civ. P. 50(b), 52(b), or 59:

Date of entry of order deciding post-judgment motion:

Date of filing of petition for appeal:

Date of entry of order extending appeal period:

Time extended to:

FINALITY OF ORDER OR JUDGMENT

Is the order or judgment appealed from a final decision on the merits as to all issues and parties?

☐ YES ☐ NO

If no, was the order or judgment entered pursuant to R. Civ. P. 54(b)?

☐ YES ☐ NO ☐ N/A

Has the defendant been convicted? ☐ YES ☐ NO ☐ N/A

Has a sentence been imposed? ☐ YES ☐ NO ☐ N/A

Is the defendant incarcerated? ☐ YES ☐ NO ☐ N/A

Has this case previously been appealed? ☐ YES ☐ NO ☐ N/A

If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court?

☐ YES

☐ NO

If yes, cite the case and the manner in which it is related on a separate sheet.

CASE INFORMATION

State generally the **nature of the suit**, the **relief sought**, and the **outcome below**. [Attach an additional sheet, if necessary.]

State the **issues to be raised on appeal**. [Attach an additional sheet, if necessary. Use carriage returns to number the issues in a manner corresponding with the petition for appeal.]

Continued: State the **issues to be raised on appeal**. [Attach an additional sheet, if necessary. Use carriage returns to number the issues in a manner corresponding with the petition for appeal.]

CASE MANAGEMENT INFORMATION

Do you wish to make an oral presentation of the petition?

☐ YES ☐ NO

Has the entire or only portions of the record been designated?

☐ ENTIRE ☐ PORTION

If the appeal is granted, do you desire reproduction of the record or that the case be heard on the original record?

☐ REPRODUCED
☐ ORIGINAL

List counsel for each adverse party to the appeal. Include name, firm name, address, and telephone number. If unrepresented by counsel, provide the address and telephone number of the adverse party. Attach an additional sheet if necessary.

List the Petitioner[s] name: Enter name here. Delete this text first.

If incarcerated, provide institutional address:

Name of attorney or pro se litigant filing Docketing Statement: Enter name here. Delete this text first.

☐ ATTORNEY ☐ PRO SE

Will you be handling the appeal? ☐ YES ☐ NO

If so, provide firm name, address, and telephone number:

If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature: _____

WV Bar No. _____

Date: _____

Remember to Attach:

1. Additional pages, if any, containing extended answers to questions on this form.
2. A copy of the order or judgment from which the appeal is taken.
3. A Certificate of Service.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

**MOTION TO WITHDRAW AS COUNSEL
DUE TO LACK OF GROUNDS FOR APPEAL**

Comes now Counsel for the Defendant, [*counsel name*], and pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), Rhodes v. Leverette, 160 W.Va. 781, 239 S.E.2d 136 (1977) and Turner v. Haynes, 162 W.Va. 33, 245 S.E.2d 629 (1978), does hereby move that the Court permit Counsel to withdraw from the captioned matter on the grounds that there are no meritorious grounds for the appeal herein.

In support of this motion, Counsel asserts that [*he/she*] has fully and thoroughly investigated and researched the record in the case herein and has concluded that there are no meritorious grounds that can be asserted on an appeal of this conviction. Pursuant to the above authority, Counsel has prepared the attached brief referring to all points in the record that might arguably support an appeal.

[*defendant*],
By Counsel

[*counsel name and bar #*]

[*address*]

Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

BRIEF IN SUPPORT OF
MOTION TO WITHDRAW AS COUNSEL
DUE TO LACK OF GROUNDS FOR APPEAL

Comes now Counsel for the Defendant, [*counsel name*], and pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), Rhodes v. Leverette, 160 W.Va. 781, 239 S.E.2d 136 (1977) and Turner v. Haynes, 162 W.Va. 33, 245 S.E.2d 629 (1978), does hereby provide the Court with this Brief in Support of [*his/her*] Motion to Withdraw as Counsel in the matter herein.

FACTS

[*state any and all facts pertinent to the potential appeal*]

POTENTIAL APPEAL ISSUES

[*list any and all potential appeal issues, including supporting law, and also list reasons for deeming these issues to be frivolous or without merit*]

CONCLUSION

[*summarize counsel's position regarding filing of appeal*]

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent,

VS.

SUPREME COURT # _____
[*county and case #*]

[*client's name*],
Petitioner.

**MOTION FOR LEAVE TO EXCEED
PETITION PAGE LIMITS**

COMES NOW the Petitioner, [*defendant's name*], by and through [*his/her*] Counsel, [*counsel name*], and pursuant to Rule 3(c) of the West Virginia Rules of Appellate Procedure, does hereby move the Honorable Court for leave to exceed the fifty (50) page limit mandated therein.

In support of this motion, Counsel for the Appellant asserts the following:

[*cite factual and/or legal reasons for Court to permit extra pages in Petition, including estimated number of pages in excess*].

THEREFORE, the Petitioner respectfully requests that the Honorable Court grant permission for [*him/her*] to submit the Petition herein in excess of fifty (50) pages.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

NO. _____

**IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below - Respondent,

VS.

CIRCUIT COURT OF [*COUNTY*] COUNTY
CASE # [*circuit court case #*]

[***DEFENDANT'S NAME***],
Defendant Below - Petitioner.

PETITION FOR APPEAL

Counsel for Petitioner:
[*counsel name*]
[*address*]
[*telephone number*]

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.	
KIND OF PROCEEDING AND NATURE OF RULINGS BELOW	
STATEMENT OF FACTS.	
ASSIGNMENTS OF ERROR.	
POINTS AND AUTHORITIES RELIED UPON.	
ARGUMENT AND DISCUSSION OF LAW.	
PRAYER FOR RELIEF.	

* * *

TABLE OF AUTHORITIES

* * *

P E T I T I O N

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

* * *

STATEMENT OF FACTS

* * *

ASSIGNMENTS OF ERROR

[*include manner in which they were decided in the lower court*]

* * *

POINTS AND AUTHORITIES RELIED UPON

* * *

ARGUMENT AND DISCUSSION OF LAW

* * *

PRAYER FOR RELIEF

* * *

[*petitioner*],
By Counsel

[*counsel name and bar #*]
[*address*]
[*telephone number*]
Counsel for Defendant

* * *

CERTIFICATE OF SERVICE

I, [*counsel name*], hereby certify that I have served this PETITION FOR APPEAL on the _____ day of _____, 20____, by [*first-class mailing to last-known address, postage prepaid, or personal delivery*] to the following persons:

[*party to be served*]
[*address*]

Counsel for Petitioner

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],

DEFENDANT.

DESIGNATION OF RECORD FOR APPEAL

Comes now the Defendant, [*name*], by and through [*his/her*] Counsel, [*counsel name*], and pursuant to Rule 4(c) of the West Virginia Rules of Appellate Procedure, does hereby designate the following pleadings, orders and exhibits to accompany the Petition for Appeal to the West Virginia Supreme Court of Appeals:

[*itemize all such pleadings or other documents, or state all pleadings, exhibits and transcripts contained in the court files*].

[*defendant*],
By Counsel

[*counsel name and bar #*]

[*address*]

Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**DESIGNATION OF ADDITIONAL PARTS OF
RECORD FOR APPEAL**

Comes now the Defendant, [*name*], by and through [*his/her*] Counsel, [*counsel name*],
and pursuant to Rule 8(a)(1), does hereby designate the following additional portions of the record
to accompany the appeal to the West Virginia Supreme Court of Appeals:

[*specify additional portions of the record to be sent with appeal*].

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**PETITIONER'S NOTICE OF ADEQUATE
RECORD FOR APPEAL**

Comes now the Defendant/Petitioner, [*name*], by and through [*his/her*] Counsel, [*counsel name*], and pursuant to Rule 8(a)(1), does hereby notify the Court that the Petitioner considers the record adequate and does not desire to supplement the record.

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA
STATE OF WEST VIRGINIA,

VS.

CASE # [*case number*]
[*judge's name*], JUDGE

[*client's name*],
DEFENDANT.

**ADDITIONAL DESIGNATION OF
RECORD FOR APPEAL**

Comes now the Defendant, [*name*], by and through [*his/her*] Counsel, [*counsel name*],
and pursuant to Rule 8(a)(1), and having received the designation of the respondent herein, does
hereby designate the following additional portions of the record to accompany the appeal to the West
Virginia Supreme Court of Appeals:

[*specify additional portions of the record to be sent with appeal*].

[*defendant*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Defendant

NO. _____

**IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below - Respondent,

VS.

CIRCUIT COURT OF [*COUNTY*] COUNTY
CASE # [*circuit court case #*]

[*DEFENDANT'S NAME*],
Defendant Below - Petitioner.

BRIEF OF PETITIONER

Counsel for Petitioner:
[*counsel name*]
[*address*]
[*telephone number*]

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.	
KIND OF PROCEEDING AND NATURE OF RULINGS BELOW	
STATEMENT OF FACTS.	
ASSIGNMENTS OF ERROR.	
POINTS AND AUTHORITIES RELIED UPON.	
ARGUMENT AND DISCUSSION OF LAW.	
PRAYER FOR RELIEF.	

* * *

TABLE OF AUTHORITIES

* * *

P E T I T I O N

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

* * *

STATEMENT OF FACTS

* * *

ASSIGNMENTS OF ERROR

[*include manner in which they were decided in the lower court*]

* * *

POINTS AND AUTHORITIES RELIED UPON

* * *

ARGUMENT AND DISCUSSION OF LAW

* * *

PRAYER FOR RELIEF

* * *

[*petitioner*],
By Counsel

[*counsel name and bar #*]
[*address*]
[*telephone number*]
Counsel for Defendant

* * *

CERTIFICATE OF SERVICE

I, [*counsel name*], hereby certify that I have served this BRIEF OF PETITIONER on the
_____ day of _____, 20____, by [*first-class mailing to last-known address, postage
prepaid, or personal delivery*] to the following persons:

[*party to be served*]
[*address*]

Counsel for Petitioner

B. POST-CONVICTION HABEAS CORPUS PROCEEDINGS

Comments

1. Rules Governing Post-Conviction Habeas Corpus Proceedings - Pursuant to W.Va. Code, § 53-4A-2, as amended, the Supreme Court of Appeals was granted authority to “prescribe the form of the petition, verification and the writ [...]” in regard to a post-convictions writ of habeas corpus ad subjiciendum. In 1977, the Court provided only the forms designated by the Court, but in 1999 the Court promulgated the attached rules, together with revised forms. In addition to the form for the petition, the rules address the manner of filing the petition; service of the petition; the preliminary consideration of the petition by the court; appointment of counsel; discovery; and the procedures for an evidentiary hearing.
2. Petition for Habeas Corpus Ad Subjiciendum - Attached to the rules as Appendix A, in practice this Petition is usually completed by the defendant and submitted to the appropriate court. After the petition is filed, it is reviewed by the Court. If the Court determines that the petitioner may have some grounds for relief but that the petition is not sufficient for the Court to conduct a fair appraisal of the matters in the petition, the Court must appoint counsel to represent the petitioner in the proceedings [provided that the defendant qualifies for court-appointed counsel]. Rule 4(b). If, however, the Court determines that the grounds asserted in the petition have been “previously or finally adjudicated or waived”, the court may summarily dismiss the petition. Rule 4(c).
3. Application to Proceed In Forma Pauperis and Affidavit - Because habeas corpus proceedings are deemed to be civil in nature [see W.Va. Code § 53-4A-1(a)], filing fees and other costs are a necessary part of the litigation. However, an indigent petitioner may apply for leave to proceed *in forma pauperis* and thus receive relief from these costs. In addition, the rules require the completion of this application and affidavit prior to the appointment of counsel. Rule 3(a); Rule 6.
4. Losh v. McKenzie checklist - Losh v. McKenzie, 166 W.Va. 762, 277 S.E.2d 606 (1981), is generally considered to be one of the most informative cases regarding post-conviction habeas corpus relief. In addition to providing a general discussion of habeas corpus procedures, the Court provided a “checklist” of potential grounds that counsel may consider in seeking habeas corpus relief.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of December, 1999, the following order was made and entered:

**In re: Rules Governing Post-Conviction Habeas
Corpus Proceedings In West Virginia**

On this day came the Court and proceeded to consider Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia, together with a Post-Conviction Habeas Corpus Petition Form. Upon consideration thereof, the Court is of opinion to and doth hereby adopt said rules, together with Appendix A and Appendix B annexed hereto, effective immediately. The Rules will apply to all post-conviction habeas corpus matters pending in the circuit courts of this State on the date of this Order. This Court's previous Order related to Post-Conviction Habeas Corpus Forms, promulgated February 1, 1977, is hereby superseded.

**RULES GOVERNING POST-CONVICTION HABEAS CORPUS PROCEEDINGS
IN WEST VIRGINIA**

Rule 1. Purpose and Scope of Rules.

These rules have been adopted to provide the procedure for post-conviction habeas corpus proceedings as they are set forth in West Virginia Code § 53-4A-1 et seq. These rules supplement, and in designated instances supersede, the statutory procedures set forth in § 53-4A-1 et seq., of the West Virginia Code. For petitions filed in any circuit court in the State, all of the rules apply. For petitions filed in the Supreme Court of Appeals, only Rule 2 applies.

Rule 2. Petition.

(a) *Form of petition; copies.* -- Any person in this State seeking post-conviction habeas corpus relief, either in the circuit courts or in the Supreme Court of Appeals, shall file an original and two copies of a petition. The petition shall be in substantially the form annexed to these rules as Appendix A. The petition shall specify: (1) all the grounds for relief which are available to the petitioner; (2) a summary of the facts supporting each of the grounds specified; and (3) a specific statement of the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed or verified under penalty of perjury by the petitioner.

(b) *Return of insufficient petition.* -- If a petition received by the clerk of a circuit court or the clerk of the Supreme Court of Appeals does not substantially comply with the requirements of Rule 2, it may be returned to the petitioner together with a statement of the reason for its return. The clerk of the court in which the petition is filed shall retain a copy of the petition.

Rule 3. Filing Petition.

(a) *Place of filing; filing fee.* -- A petition may be filed:

(1) in the circuit court of the county wherein the petitioner is incarcerated; or (2) in the circuit court of the county wherein the petitioner was convicted and sentenced. If appropriate, the circuit court may transfer a petition to either venue. [See Transfer of petition at Rule 4(a), *supra*.] It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. In order to receive in forma pauperis status, the petitioner must complete the form annexed to these rules as Appendix B and demonstrate to the satisfaction of the circuit court that he or she is unable to pay the costs of the proceeding or to employ counsel.

(b) *Filing and service.* -- Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with Rules 2 and 3, the clerk of the circuit court shall file the petition and enter it on the docket in his or her office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the circuit court.

Rule 4. Preliminary Consideration by the Circuit Court.

(a) *Evaluation for transfer of petition* -- The original petition shall be presented promptly to the circuit court, [“the court”], in accordance with the procedure of the court for assignment of its business. The court shall promptly review whether the petition should be transferred to a venue set forth in Rule 3(a). If transfer is appropriate, the court shall promptly enter an order transferring the petition.

(b) *Initial review; appointment of counsel to file amended petition.* -- If the petition is not transferred, the circuit court shall promptly conduct an initial review of the petition. If, upon initial review of the petition and any exhibits in support thereof, the court determines that the petitioner may have grounds for relief but the petition, as filed, is not sufficient for the court to conduct a fair adjudication of the matters raised in the petition, the court shall appoint an attorney to represent the petitioner’s claims in the matter, provided that the petitioner qualifies for the appointment of counsel under Rule 3(a). The court may order appointed counsel to file an amended petition for postconviction habeas corpus relief within the time period set by the court.

(c) *Evaluation for summary dismissal; contents of summary dismissal order.* -- The petition shall be examined promptly by the judge to whom it is assigned. The court shall prepare and enter an order for summary dismissal of the petition if the contentions in fact or law relied upon in the petition have been previously and finally adjudicated or waived. The court’s summary dismissal order shall contain specific findings of fact and conclusions of law as to the manner in which each ground raised in the petition has been previously and finally adjudicated and/or waived. If the petition contains a mere recitation of grounds without adequate factual support, the court may enter an order dismissing the petition, without prejudice, with directions that the petition be refiled containing adequate factual support. The court shall cause the petitioner to be notified of any summary dismissal.

(d) *Order to file answer.* -- For all petitions not dismissed summarily as provided in Rule 4(c), the court shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the court deems appropriate. A copy of the order

directing that an answer be filed shall be served upon the prosecuting attorney of the county wherein the petition will be heard.

Rule 5. Answer; Contents.

Within such time as may be specified by the court, the State shall file an answer which shall respond to the allegations of the petition. The answer may be consolidated with other pleadings, such as a motion under Rule 12(b)(6) or Rule 56 of the West Virginia Rules of Civil Procedure. The answer shall indicate what transcripts [of pretrial, trial, sentencing, and post-conviction proceedings] are available, when they can be furnished and what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court, on its own motion or upon request of the petitioner, may order that further portions of the existing transcripts be transcribed and furnished. If a transcript is neither available nor procurable, a properly verified narrative summary of the evidence may be submitted.

Rule 6. Appointment of Counsel.

If counsel has not been previously appointed as provided in Rule 4(b), and the petition is not summarily dismissed, the court may appoint counsel to represent the petitioner. Counsel may only be appointed if the petitioner qualifies for the appointment of counsel under Rule 3(a), and the court has determined that the petition was filed in good faith and that the appointment of counsel is warranted. If warranted, the court shall appoint counsel for the petitioner.

Rule 7. Discovery.

(a) *Leave of court required.*-- In post-conviction habeas corpus proceedings, a prisoner may invoke the processes of discovery available under the West Virginia Rules of Civil Procedure if, and to the extent that, the court in the exercise of its discretion, and for good cause shown, grants leave to do so. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the court for a petitioner who qualifies for the appointment of counsel under Rule 3(a).

(b) *Requests for discovery.*-- Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) *Expenses.*-- If the respondent is granted leave to take the deposition of the petitioner or any other person, the court may, as a condition of taking the deposition, direct the respondent to pay the expenses of travel, subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

Rule 8. Expansion of Record.

(a) *Direction for expansion.* -- If the petition is not summarily dismissed, the court may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) *Materials to be added.* -- The expanded record may include, without limitation, letters predating the filing of the petition in the court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the court. Affidavits may be submitted and considered as part of the record.

(c) *Submission to opposing party.*-- In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the other party against whom they are to be offered, and he or she shall be afforded an opportunity to admit or deny their correctness.

(d) *Authentication.*-- The court may require the authentication of any material under subdivision (b) or (c).

Rule 9. Evidentiary hearing.

(a) *Determination by court.* -- If the petition is not dismissed at a previous stage in the proceeding, the circuit court, after the answer is filed, shall, upon a review of the record, if any, determine whether an evidentiary hearing is required. If the court determines that an evidentiary hearing is not required, the court shall include in its final order specific findings of fact and conclusions of law as to why an evidentiary hearing was not required.

(b) *Hearing* -- If the court determines that an evidentiary hearing is necessary, the court shall hold a hearing and/or take evidence on the matters raised in the petition. The court shall pass upon all issues of fact without a jury. The court shall inquire on the record as to whether the petitioner has raised all available grounds for habeas corpus relief. The court shall also ascertain on the record whether the petitioner has knowingly and intelligently waived all grounds for habeas corpus relief not asserted. The court may also provide for one or more hearings to be held and/or evidence to be taken in any other county or counties in the State.

(c) *Order* -- The court shall draft a comprehensive order including: (1) findings as to whether a state and/or federal right was presented in each ground raised in the petition; (2) findings of fact and conclusions of law addressing each ground raised in the petition; (3) specific findings as to whether the petitioner was advised concerning his obligation to raise all grounds for post conviction relief in one proceeding; and (4) if the petitioner appeared pro se, specific findings as to whether the petitioner knowingly and intelligently waived his right to counsel.

Rule 10. West Virginia Rules of Civil Procedure; Extent of Applicability.

The West Virginia Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed in West Virginia circuit courts under these rules.”

It is hereby ordered that the Clerk of this Court provide the circuit judges, circuit clerks, prosecuting attorneys and public defender offices in this State with a copy of this order and attachments.

A True Copy

//S// **Deborah L. McHenry**
Clerk, Supreme Court of Appeals

APPENDIX A

POST-CONVICTION HABEAS CORPUS FORM

PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM UNDER W.VA. CODE § 53-4A-1

Instructions - Read Carefully

1. This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
2. Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
3. Upon receipt of a fee of \$ 85.00 your petition will be filed if it is in proper order.
4. If you do not have the necessary funds for fees, transcripts, counsel, and other costs connected with a petition of this type, you may request permission to proceed *in forma pauperis*, by executing the form attached as Appendix B, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money on deposit to your credit in any account in the institution.
5. Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
6. When the petition is fully completed, the original and at least two copies may be mailed to (1) the clerk of the circuit court of the county where you are incarcerated; or (2) the clerk of the circuit court of the county where you were convicted and sentenced. You may also file the petition with the Clerk of the Supreme Court of Appeals. You are advised, however, that the Supreme Court rarely grants relief on petitions originally filed there.
7. Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION UNDER W.VA. CODE § 53-4A-1 FOR WRIT OF HABEAS CORPUS

STATE OF WEST VIRGINIA

County _____

Name _____ Prisoner No. _____ Case No. _____

Place of Confinement _____

Name of Petitioner [include name under which convicted] _____

Name of Respondent [authorized person having custody of petitioner] _____

v.

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____

2. Date of judgment of conviction _____

3. Length of sentence _____

4. Nature of offense involved [all counts] _____

5. What was your plea? [Check one]

(a) Not guilty ☐

(b) Guilty ☐

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? [Check one]

(a) Jury ☐

(b) Judge Only ☐

7. Did you testify at the trial? Yes ☐ No ☐

8. Did you file a direct appeal from the judgment of conviction in the Supreme Court of Appeals?

Yes ☐ No ☐

9. If you did appeal, answer the following:

(a) Date of filing _____

(b) Grounds raised _____

(c) Was the petition granted or refused ☐ or refused ☐ ?

(d) If refused, what was date of refusal? _____

(e) If granted, give date and type of result and citation, if known. _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the circuit court, you must state grounds that have NOT been previously and finally adjudicated or waived. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, *you should raise in this petition all available grounds* [relating to this conviction] on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS [state *briefly* without citing cases or law] _____

B. Ground two: _____

Supporting FACTS [state *briefly* without citing cases or law] _____

C. Ground three: _____

Supporting FACTS [state *briefly* without citing cases or law] _____

D. Ground four: _____

Supporting FACTS [state *briefly* without citing cases or law] _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Have you, or an attorney representing you, obtained a transcript of the criminal proceedings which resulted in the conviction under attack? Yes ☐ No ☐

17. If your answer to 16 was "no," have you submitted an Appellate Transcript Request form for transcripts to the circuit court, a court reporter, or any other tribunal or individual?

Yes ☐ No ☐

18. If your answer to 17 was "yes," attach a copy, if available, of the Appellate Transcript Request form and provide the name of the court or person to whom it was submitted and the date of submission.

(a) Copy of request is attached ☐

(b) Date ☐

(c) Name _____

19. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☐

20. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney [if any]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
[date]

Signature of Petitioner

APPENDIX B

POST-CONVICTION HABEAS CORPUS FORM
APPLICATION TO PROCEED IN FORMA PAUPERIS
AND AFFIDAVIT

STATE OF WEST VIRGINIA County

Name _____ Prisoner No. _____ Case No. _____

Place of Confinement _____

Name of Petitioner [include name under which convicted] Name of Respondent [authorized person having custody of petitioner] _____

v.

NOTICE: This form is only to be used by incarcerated persons seeking post-conviction habeas corpus relief pursuant to W.Va. Code § 53-4A-1, et seq.

□□□

I, _____ declare that I am the petitioner in the above-entitled proceeding; that in support of my request to proceed without prepayment of fees or costs, I declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief sought in the petition. In support of this application, I answer the following questions under penalty of perjury:

1. State the place of your incarceration _____.

Are you employed at the institution? ____ Do you receive any payment from the institution? ____

Have the institution fill out the Certificate portion of this application and attach a ledger sheet from the institution[s] of your incarceration showing at least the past **six** months' transactions.

2. In the past twelve months have you received any money from any of the following sources?

- | | |
|---|--|
| a. Business, profession or other self-employment | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| b. Rent payments, interest or dividends | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| c. Pensions, annuities or life insurance payments | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| d. Disability or workers compensation payments | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| e. Gifts or inheritances | Yes <input type="checkbox"/> No <input type="checkbox"/> |
| f. Any other sources | Yes <input type="checkbox"/> No <input type="checkbox"/> |

If the answer to any of the above is "Yes" describe each source of money and state the amount received and what you expect you will continue to receive.

3. Other than any institutional accounts, do you have any cash, checking or savings accounts? Yes ☐ No ☐

If "Yes" state the total amount _____.

4. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or other valuable property? Yes ☐ No ☐

If "Yes" describe the property and state its value. _____

_____.

5. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support. _____

I declare under penalty of perjury that the above information is true and correct.

DATE

SIGNATURE OF APPLICANT

CERTIFICATE

[To be completed by the institution of incarceration]

I certify that the applicant named herein has the sum of \$_____ in a trustee spending account to his/her credit at [name of institution] _____. I further certify that during the past six months the applicant's average balance was \$_____, and the average of monthly deposits was \$_____.

DATE

SIGNATURE OF AUTHORIZED OFFICER

**CHECKLIST OF POTENTIAL GROUNDS
FOR HABEAS CORPUS RELIEF
AS LISTED IN
LOSH V. McKENZIE,
166 W.Va.762, 277 S.E.2d 606 [1981]**

- (1) trial court lacked jurisdiction
- (2) statute under which conviction obtained unconstitutional
- (3) indictment shows on face no offense was committed
- (4) prejudicial pretrial publicity
- (5) denial of right to speedy trial
- (6) involuntary guilty plea
- (7) mental competency at time of crime
- (8) mental competency at time of trial cognizable even if not asserted at proper time or if resolution not adequate
- (9) incapacity to stand trial due to drug use
- (10) language barrier to understanding the proceedings
- (11) denial of counsel
- (12) unintelligent waiver of counsel
- (13) failure of counsel to take an appeal
- (14) consecutive sentences for same transaction
- (15) coerced confessions
- (16) suppression of helpful evidence by prosecutor
- (17) state's knowing use of perjured testimony
- (18) falsification of transcript by prosecutor
- (19) unfulfilled plea bargains
- (20) information in presentence report erroneous
- (21) ineffective assistance of counsel
- (22) double jeopardy
- (23) irregularities in arrest
- (24) excessiveness or denial of bail
- (25) no preliminary hearing
- (26) illegal detention prior to arraignment
- (27) irregularities or errors in arraignment
- (28) challenges to the composition of the grand jury or its procedures
- (29) failure to provide copy of indictment to defendant
- (30) defects in indictment
- (31) improper venue
- (32) pre-indictment delay
- (33) refusal of continuance
- (34) refusal to subpoena witnesses
- (35) prejudicial joinder of defendants
- (36) lack of full public hearing
- (37) nondisclosure of grand jury minutes
- (38) refusal to turn over witness notes after witness has testified
- (39) claim of incompetence at time of offense, as opposed to time of trial
- (40) claims concerning use of informers to convict
- (41) constitutional errors in evidentiary rulings
- (42) instructions to the jury
- (43) claims of prejudicial statements by trial judges

- (44) claims of prejudicial statements by prosecutor
- (45) sufficiency of evidence
- (46) acquittal of co-defendant on same charge
- (47) defendant's absence from part of proceedings
- (48) improper communications between prosecutor or witnesses and jury
- (49) question of actual guilt upon an acceptable guilty plea
- (50) severer sentence than expected
- (51) excessive sentence
- (52) mistaken advise of counsel as to parole or probation eligibility
- (53) amount of time served on sentence, credit for time served

V. JUVENILE AND ABUSE/NEGLECT CASES

Comments

Few areas of the law are as fraught with procedural difficulties as juvenile delinquency and abuse/neglect cases. Most of the motions that an attorney might file in these cases are similar in form to those filed in criminal cases, and are provided elsewhere in this Manual. What will be provided herein are some basic concepts and standard statutory and case law provisions that may be helpful in your practice.

A. Juvenile Delinquency - W.Va. Code §§ 49-5-1, et. seq., concern proceedings instituted against alleged juvenile offenders. Amongst the myriad issues that counsel might face in these proceedings are:

- the legality of the petition filed against the juvenile (§ 49-5-7);
- jurisdictional issues regarding the power of the court (§ 49-5-2);
- the right of the juvenile to a jury trial (§ 49-5-6);
- the transfer of a juvenile case to adult jurisdiction (§ 49-5-10);
- procedures for status offenders (§ 49-5-11);
- disposition of juvenile offenders (§ 49-5-13); and
- issues regarding confidentiality of juvenile proceedings (§ 49-5-17).

Few of these issues have been as heavily litigated and disputed as the basic question of when the State can detain and/or incarcerate a juvenile offender. The W.Va. Supreme Court Appeals answered many of these questions in Facilities Review Panel v. Coe, 187 W.Va. 541, 420 S.E.2d 532 (1992). In Coe, the Court adopted a modified version of the American Bar Association's juvenile justice standards regarding juvenile detention. Briefly, Coe sets forth a number of standards and conditions that must be met before a juvenile can be detained, and sets specific mandatory time limits on several different aspects of detention. Coe also addresses overcrowding in juvenile detention centers and sets forth the manner in which overcrowding is to be addressed by the circuit courts. Of particular interest in Coe is Appendix A, which sets forth the standards relating to the secure detention of juvenile offenders between arrest and disposition.

B. Abuse and Neglect Proceedings - Representation of children or parents in abuse/neglect cases has traditionally been a difficult and challenging task. The relevant statutory provisions, W.Va. Code § 49-6-1, et. seq., have provided general guidance as to the procedures involved in such cases. However, guidance as to specific procedures regarding case plans, disposition plans, etc., and other pertinent matters were frequently left to the discretion of the circuit court. Consequently, similar cases often produced different results in different counties.

Effective January 1, 1997, the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings seek to establish a uniform approach to a number of specific issues regarding abuse/neglect cases. The basic purpose of the Rules is "to achieve safe, stable, and secure permanent homes for abuse and/or neglected children and fairness to all litigants." The requirements and procedures established in accordance with these Rules are noted herein on the *Child Abuse and Neglect Proceeding Flowchart*.

As with juvenile delinquency cases, some of the motions that counsel may wish to file in an abuse/neglect proceeding are similar to motions in criminal cases, i.e., discovery and appeal documents. There are, however, some notable differences.

1. Answer to Petition - Rule 17(b) of the Rules states that “(e)ach respondent [to a petition] shall serve a verified answer upon the petitioner or counsel therefore no later than 10 days after being served with the notice and petition required by law[.] Each answer. . . shall admit or controvert the allegations of the petition, stating the relationship of the child or children to the respondent and responding to such other matters as are alleged therein[.]”

2. Motion[s] for Period of Improvement

(a) *Pre-Adjudicatory* - Under W.Va. Code § 49-6-12(a) and Rule 23, any respondent in an abuse/neglect petition can request, prior to an adjudication, to be placed upon a period of improvement. This request must be made in writing and must demonstrate by clear and convincing evidence that the respondent is likely to fully participate in the period of improvement. Under § 49-6-12(a), a pre-adjudicatory period of improvement cannot exceed three (3) months. Further, § 49-6-12(b)(4) and § 49-6-12(c)(4) each indicate that a respondent may be barred from being placed on a post-adjudicatory or dispositional period of improvement if they have previously been placed on a pre-adjudicatory period.

(b) *Post-Adjudicatory* - After a finding that a child has been abused or neglected, a respondent may request a period of improvement for a period not to exceed six (6) months. This motion must also be made in writing and, as with the pre-adjudicatory motion, the respondent must demonstrate by clear and convincing evidence that the respondent is likely to fully participate in the period of improvement.

(c) *Dispositional* - W.Va. Code § 49-6-5(c) and § 49-6-12(c) each permit a respondent a period of improvement as a disposition to an abuse/neglect proceeding. As with the post-adjudicatory period of improvement, this period of improvement is for a period not to exceed six (6) months; however, both the post-adjudicatory and the dispositional period of improvement may be extended by the court for an additional three (3) months. § 49-6-12(g).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1991 Term

No. 19123

FACILITIES REVIEW PANEL; JAY MONTGOMERY BROWN,
FRANKLIN D. CLECKLEY, DANIEL F. HEDGES,
BRADLEY PYLES, AND GREGORY WAGNER, MEMBERS;
AND TAUNJA WILLIS MILLER, COMMISSIONER,
WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES
Petitioners,

v.

JUANITA COE, CIRCUIT CLERK OF WOOD COUNTY;
HONORABLE ARTHUR N. GUSTKE, JUDGE
OF THE CIRCUIT COURT OF WOOD COUNTY,
Respondents

Petition for Writ of Mandamus

WRIT GRANTED AS MOULDED

Submitted: February 5, 1991
Rehearing Granted: July 25, 1991
Filed as Modified: October 17, 1991

Mary M. Downey
Charleston, West Virginia
Attorney for Facilities Review Panel

John Shank
Senior Assistant Attorney General
Charleston, West Virginia
Attorney for Department of Human Services

George M. Scott
Spencer, West Virginia
Attorney for the Respondent Judge Gustke

JUSTICE BROTHERTON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Young children should not be placed in secure detention except in the most extraordinary cases." Syllabus point 5, State ex rel. M.C.H. v. Kinder, ___ W.Va. ___, 317 S.E.2d 150 (1984).

2. The juvenile detention standards adopted by this Court are in accord with our State law as set forth in W.Va. Code § 49-1-1 et seq. (1990) and State ex rel. M.C.H. v. Kinder, ___ W.Va. ___, 317 S.E.2d 150 (1984), and to be implemented within sixty days from the date of this opinion.

3. Before any juvenile can be sent to a detention facility, the arresting officer or the detention hearing officer must telephone the detention facility to determine whether there is a vacancy before the juvenile can be transported to the juvenile facility.

4. No facility can accept any juveniles beyond their licensed capacity and must immediately report any attempt to force them to do so to the Department of Human Services and the Juvenile Justice Committee.

5. A juvenile must remain in detention no longer than thirty days awaiting a dispositional hearing.

6. Following the dispositional hearing, a juvenile shall not remain in detention longer than fourteen days before moving the juvenile into an appropriate placement. Thus, the circuit courts must move swiftly and efficiently to avoid overcrowding.

7. In the event overcrowding occurs, the courts must develop alternate methods of detention, such as in-home detention, electronic monitoring, and emergency shelters.

8. Within ten days after the end of each month, each detention facility must file a report with the Department of Human Services and the Juvenile Justice Committee which lists each new child detained, the reason and charge, and the date the child enters and leaves the facility, including explanations of any interim absences. Also required is a listing of the number of children detained on each day of the month. The report form is to be prepared by the Department of Human Services.

Brotherton, Justice:

This case is before the Court on the response of the Special Master to our November 17, 1989, order, in which we authorized the Honorable Larry Starcher, as Special Master, to investigate the need for standardized juvenile detention guidelines, to review the detention centers and relevant statistics statewide, and to determine the need to rotate the assignment of juvenile cases among the circuit judges in each circuit.¹

This case was initiated by a petition for a writ of mandamus brought in 1989 by the Facilities Review Panel and Taunja Willis Miller, Commissioner of the West Virginia Department of Human Services, which dealt with the detention of juveniles prior to adjudicatory hearings in Wood County, West Virginia.²

¹This opinion is filed pursuant to a petition for rehearing granted on July 25, 1991. The opinion is modified to include Appendices A, A.1, A.2, and A.3.

²The petitioners asked that this Court do the following: (1) Adopt the juvenile justice standards developed by the American Bar Association and the Institute for Judicial Administration; (2) require the respondent, Circuit Clerk Juanita Coe, to rotate juvenile cases randomly among the three circuit judges presiding in Wood County; (3) require the respondent, Circuit Judge Arthur Gustke, to cooperate with the West Virginia Department of Human Services in establishing guidelines for an in-home detention program; (4) require the respondent, Judge Gustke, to arrange for utilization of the electronic monitoring systems for juveniles and provide information about the monitoring system to the Department of Human Services and the Director of the West Central Regional Juvenile Detention Center (WCRJDC) in Wood County; and (5) require that the respondent, Judge Gustke, refrain from committing additional children to the WCRJDC when the maximum capacity of ten children had been reached.

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On November 17, 1989, we issued an order appointing Larry Starcher, Judge of the Seventeenth Judicial Circuit, to act as Special Master to determine whether standardized juvenile detention guidelines were needed and to review the situation at the West Central Regional Juvenile Detention Center (WCRJDC) and other detention facilities "to determine the danger overcrowding poses to children and the resulting effect the overcrowding has on the services normally offered." In addition, Judge Starcher was to investigate the need for cases to be rotated, regardless of type, among the circuit judges of Wood County.

Judge Starcher's report was received by this Court on September 4, 1990. We compliment Judge Starcher and his assistants on an excellent and thorough report.³ Also filed is the report of private investigator, Warren Stedman, who investigated the WCRJDC at the request of the respondent, Judge Gustke. Judge Starcher's report makes it clear that juvenile detention standards exist in this State. The issue now before us, however, is whether those standards are sufficient or if the American Bar Association Juvenile Justice Standards should be adopted.

³We acknowledge the contributions of Marcia Pops and James Kane, the two probation officers who worked with Judge Starcher in completing his investigation and report.

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At the outset of his report, Judge Starcher emphasizes the legislative intent to prohibit detaining minor children in secure custody except in very specific circumstances.⁴ West Virginia Code § 49-5A-2 (1986) states that:

It shall be the duty of the judge or referee to avoid incarceration of such child in any jail. Unless the circumstances of the case otherwise require, taking into account the welfare of the child as well as the interest of society, such child shall be released forthwith into the custody of his parent or parents, relative, custodian or other responsible adult or agency.

Similarly, W.Va. Code § 49-5-8(d) provides that:

The sole mandatory issue at the detention hearing shall be whether the child shall be detained pending further court proceedings. The court shall, if advisable, and if the health, safety and welfare of the child will not be endangered thereby, release the child on recognizance to his parents, custodians or an appropriate agency; however, if warranted, the court may require bail

This Court provided further guidance on the issue of juvenile detention in State ex rel. M.C.H. v. Kinder, ___ W.Va. ___, 317 S.E.2d 150 (1984). "Young children should not be placed in secure detention except in the most extraordinary cases." Id. at syl. pt. 5. In Kinder, the Court set forth seven relevant factors to be taken into account when preadjudication detention was

⁴West Virginia Code § 49-5-8(b) (1986) relates the circumstances under which a juvenile may be taken into custody. It also provides that, once a child is taken into custody, the child must be taken immediately before a referee or circuit court judge (i.e., the next succeeding judicial day) for the purpose of holding a detention hearing based upon the previously discussed standards.

⁴West Virginia Code § 49-5-8(b) (1986) relates the circumstances under which a juvenile may be taken into custody. It also provides that, once a child is taken into custody, the child must be taken immediately before a referee or circuit court judge (i.e., the next succeeding judicial day) for the purpose of holding a detention hearing based upon the previously discussed standards.

being considered. See syl. pt. 4. The focus of the seven factors is the interest of society and the welfare of the child.

In making their report, Judge Starcher and his assistants not only reviewed the statute and case law, but also interviewed personnel involved in the various aspects of juvenile detention and reviewed statistics reported by the various detention centers. In his findings of fact, Judge Starcher reported that "the vast majority of personnel interviewed believe that there should be more of an emphasis on releasing versus detaining at the detention hearing" and that they "believe that it would be better to inappropriately release than inappropriately detain a youth." Judge Starcher concluded that the "failure to have mandatory rotation of juvenile case assignments is not a primary factor in the overcrowding of juvenile detention facilities and that the issue of whether "West Virginia needs formalized detention standards may well be only a matter of preference. Detention problems can be resolved with or without such standards."

The two options set forth by the Special Master for consideration by this Court are substantially the same. The major difference is that the first option provides that the current detention standards -- those found in W.Va. Code § 49-1-1 et seq., and State v. Kinder, discussed supra -- be maintained while the second option recommends the adoption of statewide standards, such as those found in the ABA Juvenile Justice Standards. With the implementation of tighter

detention standards, it is hoped that the detention population would be significantly reduced. However, since the possibility of overcrowding remains even with the adoption of new standards, many of the protective measures found in Option One are again recommended in Option Two.

The protective measures found in the report include requiring the hearing officer, judge, or arresting officer to call ahead to the detention center to determine if there is a vacancy. In addition, each circuit should be required to develop a back-up program to assist detention hearing officers in the event the detention centers are at maximum capacity. Other alternatives to secure detention should be developed, such as in-home detention, house arrest, electronic monitoring, and emergency shelters. The detention center must have the authority to refuse to house a juvenile if the facility is at maximum capacity and must report any infraction of overcrowding to the Juvenile Justice Committee and the Department of Human Services. Finally, following an adjudicatory hearing, a juvenile shall not remain in detention longer than thirty days awaiting a dispositional hearing, and following a dispositional hearing, the juvenile shall remain in detention no longer than fourteen days before being moved into an appropriate placement. Again, this time limitation needs to be enforced and accurate records maintained.

Judge Starcher points out that if the detention criteria are adhered to, there should be no need for a rotating judge within a circuit, noting that the complexity of juvenile case assignments makes a multi-judge system unworkable in many cases. Finally, the Special Master recommends that accurate and complete detention facility status data be maintained through standardized monthly reports to the Department of Human Services and the Juvenile Justice Committee. The status report, which is to be created by the Department of Human Services, shall be filed monthly as new cases are received and must include each new detention, the reason(s) detained, the charge, the date in, and the date out. This report will be crucial in monitoring each facility and determining if overcrowding exists due to lack of adequate space or as a result of a back-up in the system.

After reviewing both options and the attached reports, this Court concludes that there is no need to provide for a rotating judge system if detention standards similar to those recommended by the American Bar Association and the Institute for Judicial Administration are adopted. However, the recommended ABA standards must be modified to fit the specialized needs of our juvenile system. Therefore, we adopt juvenile detention standards, set forth in Appendices A, A.1, A.2, and A.3, which have been agreed upon by the Kanawha County Prosecutor, the Facilities Review Board, and the Department of Health and Human Resources. We believe the use of these guidelines will discourage the vague and often subjective method of deciding whether to detain a

juvenile. Moreover, the juvenile detention standards adopted in this opinion are in accord with our State law as set forth in W.Va. Code § 49-1-1 et seq. (1990) and State v. Kinder, ___ W.Va. ___, 317 S.E.2d 150 (1984).

Equally important are the accompanying recommendations, discussed supra, which we adopt along with the Juvenile Detention Standards:

1. Before any juvenile can be sent to a detention facility, the arresting officer or the detention hearing officer must telephone the detention facility to determine whether there is a vacancy before the juvenile can be transported to that facility.
2. No facility can accept any juveniles beyond their licensed capacity and must immediately report any attempt to force them to do so to the Department of Human Services and the Juvenile Justice Committee.
3. A juvenile must remain in detention no longer than thirty days awaiting a dispositional hearing.
4. Following the dispositional hearing, a juvenile shall not remain in detention longer than fourteen days before moving the juvenile into an appropriate placement. Thus, the circuit courts must move swiftly and efficiently to avoid overcrowding.
5. In the event overcrowding occurs, the courts must develop alternate methods of detention, such as in-home detention, electronic monitoring, and emergency shelters.

6. Within ten days after the end of each month, each detention facility must file a report with the Department of Human Services and the Juvenile Justice Committee which lists each new juvenile detained, the reason and charge, and the date the child enters and leaves the facility, including explanations of any interim absences. Also required is a listing of the number of children detained on each day of the month. The report form is to be prepared by the Department of Human Services.

We are confident that with time and effort the problem of overcrowding can be relieved. All the parties involved in this case, from the judges to the probation workers, appear deeply concerned with and committed to the juveniles entrusted to their care. We ask that they work together in implementing these new criteria and guidelines to better serve the children of this State. However, it is important to note that the Legislature has a part to play in this situation. Although we believe the number of facilities is adequate today, many of the structures need updating and the services improved. Moreover, we cannot discount the possibility that in the future, additional space and facilities will be needed. The welfare of our children is a high priority for this State, and the Legislature would be wise to plan accordingly.

However, the Legislature is not alone in its responsibilities. The Department of Human Services is duty bound to aggressively seek the funding from the Legislature necessary to fulfill those responsibilities. The Department's statutory obligations, found in W.Va. Code § 49-5-16a, may not be transferred to the judicial and legislative branches of government. Proper management of the facilities is an essential element of the solution.

Accordingly, we grant the writ as moulded, adopt the Juvenile Detention Standards set forth in Appendices A, A.1, A.2, and A.3, and order that they be implemented within sixty days. Further, the six additional elements set forth in this opinion, including the report form which is to be prepared by the Department of Human Services, are also adopted and are to be implemented and in effect sixty days from the date of this opinion.

Writ granted as moulded.

STANDARDS RELATING TO

Interim Status: Secure Detention of Accused Juvenile Offenders Between Arrest and Disposition

Guidelines for status decision.

- A. Mandatory release. -- The intake official should release the accused juvenile unless the juvenile:
1. Is charged with a criminal-type delinquent behavior which in the case of an adult would be punishable by a sentence of one year or more, and which if proven could result in commitment to a security institution, and one or more of the following additional factors is present:
 - a. The crime charged is a **category one** (Appendix A.1) juvenile offense.
 - b. The crime charged is a **category two** (Appendix A.1) juvenile offense and there is a judicial finding that the juvenile presents a danger to the public if not securely detained, pursuant to an immediate full detention hearing in which the juvenile is represented by an attorney.
 - c. The crime charged is a **category two or three** (Appendices A.1 and A.2) juvenile offense and the juvenile is an escapee from detention or any commitment setting ordered pursuant to W.Va. Code, §49-5-1 et seq; or the juvenile has a recent record of willful failure to appear at juvenile court proceedings and no measure short of secure detention can be imposed to reasonably ensure appearance.
 - d. The juvenile is waiting adjudication or disposition for an offense which would be a felony under criminal jurisdiction or a category one, two, or three offense and is charged with committing another offense during the interim period which would be a felony or a category one, two, or three offense. Another less restrictive means of supervising the juvenile such as electronic monitoring, home detention, or shelter care must have been tried and failed.
 - e. The juvenile is awaiting adjudication or disposition for an offense which would be a felony under criminal jurisdiction or a category one, two, or three offense and is released on bond conditions but is found by a judicial authority to have committed a material violation of bond as defined in Appendix A.3 of these standards. Another less restrictive means of supervising the juvenile, such as electronic monitoring, home detention, or shelter care must have been tried and failed.

2. The juvenile has been verified to be a fugitive from another jurisdiction, and an official of which has formally requested that the juvenile be placed in detention.
 3. Release may be upon bond conditions set by judicial authority.
- B. Mandatory detention. -- A juvenile who is excluded from mandatory release under subsection A. is not, pro tanto, to be automatically detained. No category of alleged conduct in and of itself may justify a failure to exercise discretion to release in consideration of the needs of the juvenile and the community.
- C. Discretionary situations.
1. Release vs. detention. In every situation in which the release of an arrested juvenile is not mandatory, the intake official should first consider and determine whether the juvenile qualifies for an available diversion program, or whether any form of control short of detention is available to reasonably reduce the risk of flight or misconduct. The official should explicitly state in writing the reasons for rejecting each of these forms of release.
 2. Unconditional vs. conditional or supervised release. In order to minimize the imposition of release conditions on persons who would appear in court without them, and present no substantial risk in the interim, each jurisdiction should develop guidelines for the use of various forms of release based upon the resources and programs available, and analysis of the effectiveness of each form of release.
 3. Secure vs. nonsecure detention. The intake official should consider nonsecure detention alternatives prior to committing a juvenile to a secure detention facility.
- D. Protective detention.
1. Placement in a nonsecure detention facility solely for the protection of an accused juvenile should be permitted only upon the voluntary written request of the juvenile in circumstances that present an immediate threat of serious bodily harm to the juvenile if released.

2. In reaching this decision, or in reviewing a protective custody decision made by the arresting officer, the intake official should first consider all less restrictive alternatives, and all reasonably ascertainable factors relevant to the likelihood and immediacy of serious bodily harm resulting from interim release or control.
- E. Threatening Witnesses. -- One additional ground for detention is a determination by a judicial authority that there exists a substantial probability of danger to witnesses should the applicant be granted bail.

CATEGORY ONE JUVENILE OFFENSE	STATE CODE
Treason	§61-1-1
Murder, 1st or 2nd Degree, or Felony Murder	§61-2-1, §61-8D-2
Murder of Child by Parent	§61-8D-2
Kidnapping	§61-2-14a
Sexual Assault, 1st or 2nd Degree	§61-8B-3
Robbery, Aggravated or Non-aggravated	§61-2-12
Malicious Assault	§61-2-9
Manufacture/Delivery of Narcotics	§60A-4-401(a) §60A-4-408
Arson, 1st Degree	§61-3-1
Sexual Assault of Spouse	§61-8B-6
Sexual Abuse, 1st Degree	§61-8B-7
Attempted Category One Offense	§61-11-8

CATEGORY TWO JUVENILE OFFENSE	STATE CODE
Child Sexual Abuse	§61-8D-5(a)
Incest	§61-8-12
Child Abuse, Injurious	§61-8D-3
Child Neglect, Injurious	§61-8D-4
Burglary	§61-3-11
Sexual Assault, 3rd Degree	§61-8B-5
Voluntary Manslaughter	§61-2-4
Sexual Abuse, 2nd Degree	§61-8B-8
Unlawful Wounding	§61-2-9
Attempted Category Two Offense	§61-11-8

APPENDIX A.2

CATEGORY THREE JUVENILE OFFENSE	STATE CODE
DUI (causing death)	§17C-5-2
Abduction	§61-2-14
Child Under 16, Sexual Procurement	§61-8D-5(b)
Extortion	§61-2-13
DUI, 2nd or 3rd Offense or Personal Injury	§17C-5-2
Possession/Placing Explosives	§61-3-7
Malicious Killing of Animal	§61-3-27
Arson, 2nd, 3rd, or 4th Degree	§§61-3-2, -3, -4
Unlawful Shooting	§61-2-11
Involuntary Manslaughter	§61-2-5
Negligent Homicide (vehicular)	§17C-5-1
Battery	§61-2-9(c)
Brandishing Deadly Weapon	§61-7-11
Hit and Run, Personal Injury	§17C-4-1
Carrying Concealed Deadly Weapon	§61-7-8
Escape from Jail or Department of Corrections	§61-5-10, §61-5-12a
Sexual Abuse, 3rd Degree	§61-8B-9
Possession, Manufacture or Delivery of Controlled Substances Other Than Narcotics (except possession of less than 15 grams of marijuana)	§60A-4-401 et seq.
Attempted Category Three Offense	§61-7-8

DEFINITIONS OF TERMS RELEVANT TO THE STANDARDS

Commitment setting. Any out-of-home setting in which a juvenile is placed pursuant to order of a judicial authority under W.Va. Code, §49-5-1 et seq.

Control. A restricted or regulated nondetention interim status, including release on conditions or under supervision.

Detention. Placement during the interim period of an accused juvenile in a home or facility other than that of a parent, legal guardian, or relative, including facilities commonly called “detention,” “shelter care,” “training school,” “receiving home,” “group home,” “foster care,” and “temporary care.”

Final disposition.

The implementation of a court order of

- A. release based upon a finding that the juvenile is not guilty of committing the offense charged; or
- B. supervision, punishment, treatment, or correction based upon a finding that the juvenile is guilty of committing the offense charged.

Interim period. The interval between the arrest or summons of an accused juvenile charged with a criminal offense and the implementation of a final judicial disposition. The term “interim” is used as an adjective referring to this interval, e.g., “interim status,” “interim liberty,” and “interim detention.”

Judicial authority. An official statutorily designated within a local juvenile justice system to conduct hearings on juvenile delinquency matters; circuit court judges, juvenile referees, and any magistrate performing in the absence of a juvenile referee.

Material violation of bond. A violation of a court ordered release condition in which the juvenile is found by the court to pose a risk to community safety if not detained, including but not limited to charges of criminal-type conduct, a positive drug screen when the juvenile has been charged or adjudicated upon drug-related offense(s), or involvement with other persons prohibited by the court in consideration of public safety or judicial process; excluding status offense-type behavior including but not limited to violations related to school attendance, curfew, or alleged incorrigible behavior.

Nonsecure detention facility. A detention facility that is open in nature and designed to allow maximum participation by the accused juvenile in the community and its resources. It is intended primarily to minimize psychological hardships on an accused juvenile offender who is held out-of-home rather than to restrict the freedom of the juvenile. These facilities include, but are not limited to:

- A. single family foster homes or temporary boarding homes;
- B. group homes with a resident staff, which may or may not specialize in a particular problem area, such as drug abuse, alcohol abuse, etc.; and
- C. facilities used for the housing of neglected or abused juveniles.

Parent.

Any of the following:

- A. the juvenile's natural parents, stepparents, or adopted parents, unless their parental rights have been terminated;
- B. if the juvenile is a ward of any person other than his or her parent, the guardian of the juvenile;
- C. if the juvenile is in the custody of some person other than his or her parent whose knowledge of participation in the proceedings would be appropriate, the juvenile's custodian; and
- D. separated and divorced parents, even if deprived by judicial decree of the respondent juvenile's custody.

Release. The unconditional and unrestricted interim liberty of a juvenile, limited only by the juvenile's promise to appear at judicial proceedings as required. It is sometimes referred to as "release on own recognizance."

Release on condition. The release of an accused juvenile under written requirements that specify the terms of interim liberty, such as living at home, reporting periodically to a court officer, or refraining from contact with named witnesses.

Release under supervision. The release of an accused juvenile to an individual or organization that agrees in writing to assume the responsibility for directing, managing, or overseeing the activities of the juvenile during the interim period.

Secure detention facility. A facility characterized by physically restrictive construction and procedures that are intended to prevent an accused juvenile who is placed there from departing at will.

Security institution. A commitment setting in which juveniles placed may be restricted from normalized community involvement by use of bars, fences, locked rooms, or physical restraint.

Status decision. A decision made by an official that results in the interim release, control, or detention of an arrested juvenile. In the adult criminal process, it is often referred to as the bail decision.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

[*name of petitioner*],
Petitioner,

VS. CIVIL ACTION # [*case number*]
[*judge's name*], JUDGE

[*name of respondents*],
Respondents.

VERIFIED ANSWER TO PETITION

TO: The Honorable [*judge's name*], Circuit Judge of [*county*] County, West Virginia:

COMES NOW the Respondent, [*respondent's name*], by and through [*his/her*] Counsel,
[*counsel's name*], and does hereby assert that the circumstances of the Respondent Children's care
and custody do not constitute abuse or neglect as defined in West Virginia Code § 49-1-3, as
amended.

Your Respondent, [*respondent's name*], further answers the Verified Petition heretofore filed
as follows:

- (1) [*admit or deny allegations contained in each paragraph, or state that respondent is
without sufficient knowledge to admit or deny the allegation*].

WHEREFORE, your Respondent, [*respondent's name*], would respectfully request that this
Petition be dismissed as to the Respondent.

[*respondent*],
By Counsel

[*counsel name and bar #*]

[*address*]
Counsel for Respondent, [*respondent's name*]

STATE OF WEST VIRGINIA,

COUNTY OF [*county*], to-wit:

I, _____, being first duly sworn, upon her oath, does hereby depose and say that [*he/she*] is the Respondent in the foregoing Verified Answer to the Petition filed herein; that the facts and allegations contained therein are true, except so far as they are stated to be based upon information and belief; and, that insofar as they are therein stated to be based upon information and belief, believes them to be true.

[*respondent*]

I hereby verify that the foregoing affidavit was subscribed and sworn to before me on the _____ day of _____, 20____.

Notary Public

My Commission expires _____.

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

[*name of petitioner*],
Petitioner,

VS. CIVIL ACTION # [*case number*]
[*judge's name*], JUDGE

[*name of respondents*],
Respondents.

MOTION FOR PRE-ADJUDICATORY PERIOD OF IMPROVEMENT

COMES NOW the Respondent, [*respondent's name*], by [*his/her*] Counsel, [*counsel's name*], and, pursuant to West Virginia Code § 49-6-12(a), as amended, and Rule 23 of the Rules of Procedure for Child Abuse and Neglect Proceedings, does hereby move for a pre-adjudicatory period of improvement in the matter herein.

The Respondent does further assert that [*he/she*] will fully participate in the improvement period and in any case plan adopted by the Department of Health and Human Resources pursuant to West Virginia Code § 49-6D-3, as amended.

[*respondent*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Respondent, [*respondent's name*]

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

[*name of petitioner*],
Petitioner,

VS. CIVIL ACTION # [*case number*]
[*judge's name*], JUDGE

[*name of respondents*],
Respondents.

MOTION FOR POST-ADJUDICATORY PERIOD OF IMPROVEMENT

COMES NOW the Respondent, [*respondent's name*], by [*his/her*] Counsel, [*counsel's name*], and, pursuant to West Virginia Code § 49-6-12(b), as amended, and Rule 37 of the Rules of Procedure for Child Abuse and Neglect Proceedings, does hereby move for a post-adjudicatory period of improvement in the matter herein.

The Respondent does further assert that [*he/she*] will fully participate in the improvement period and in any case plan adopted by the Department of Health and Human Resources pursuant to West Virginia Code § 49-6D-3, as amended.

[*respondent*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Respondent, [*respondent's name*]

IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

[*name of petitioner*],
Petitioner,

VS. CIVIL ACTION # [*case number*]
[*judge's name*], JUDGE

[*name of respondents*],
Respondents.

MOTION FOR DISPOSITIONAL PERIOD OF IMPROVEMENT

COMES NOW the Respondent, [*respondent's name*], by [*his/her*] Counsel, [*counsel's name*], and, pursuant to West Virginia Code § 49-6-5(c) and § 49-6-12(c), as amended, and Rule 37 of the Rules of Procedure for Child Abuse and Neglect Proceedings, does hereby move for a post-adjudicatory period of improvement in the matter herein.

The Respondent does further assert that [*he/she*] will fully participate in the improvement period and in any case plan adopted by the Department of Health and Human Resources pursuant to West Virginia Code § 49-6D-3, as amended.

[*respondent*],
By Counsel

[*counsel name and bar #*]
[*address*]
Counsel for Respondent, [*respondent's name*]

ACKNOWLEDGMENTS

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